Petition

81-798

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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THE MURRAY INVESTMENT COMPANY and
MURRAY ADVISORY CORPORATION,
Petitioners,

v.

THE LIFE INSURANCE COMPANY OF VIRGINIA,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

———

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QUESTION PRESENTED

Where a trial court conditionally submits a special verdict issue to the jury expressly limited to a specific cause of action and then determines post-verdict that the plaintiff may not recover as a matter of law on such cause of action, may the jury's answer to the issue nevertheless be used to support another ground of recovery for which the special verdict issue was not submitted to the jury?

PARTIES

The Murray Investment Company *

Murray Advisory Corporation *

The Life Insurance Company of Virginia

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* The Murray Investment Company and Murray Advisory Corporation are subsidiaries of Murray Financial Corporation. The following are also subsidiaries of Murray Financial Corporation: Murray Properties Company; Dallas-Texas National Title Company; Murray Development Company; Murray Savings Association; 1818 Corporation d/b/a Murray Travel Agency; and Murray Management Corporation. The following are affiliates of Murray Financial Corporation: Murray Mortgage Investors and Murray Insulation, Inc. Pursuant to Sup. Ct. R. 28.1, wholly-owned subsidiaries of The Murray Investment Company are not listed herein.

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THE MURRAY INVESTMENT COMPANY and
MURRAY ADVISORY CORPORATION,
Petitioners,

v.

THE LIFE INSURANCE COMPANY OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Murray Investment Company ("MIC") and Murray Advisory Corporation ("MAC") respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit in this case, entered on May 29, 1981.

OPINIONS BELOW

The opinion below is reported at 646 F.2d 224 (5th Cir. 1981), and is reproduced at App. 1a-12a. The opinion and judgment of the District Court were not reported and are set forth below at App. 20a-26a and 15a, respectively.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on May 29, 1981. App. 1a. Petitioners filed a timely petition for rehearing which was granted on July 29, 1981.

App. 13a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

Federal Rule of Civil Procedure:

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

* * * *

STATEMENT

Plaintiff (respondent here), The Life Insurance Company of Virginia ("LOV"), brought this diversity action[1] against defendants (petitioners here), The Murray

[1] Jurisdiction of the trial court was invoked pursuant to 28 U.S.C. § 1332.

Investment Company ("MIC") and Murray Advisory Corporation ("MAC"), arising out of LOV's purchase from MIC of a certain real estate note (the "Note"). MIC and LOV were parties to a correspondent agreement whereby MIC, as correspondent, submitted loan applications to LOV and serviced any loan purchased by LOV. LOV, in turn, provided long-term permanent financing to borrowers who had obtained interim construction financing elsewhere.

In the instant case, LOV purchased from MIC the Note and accompanying security agreements which a borrower had executed to obtain interim construction financing to construct an office building (the "Building") which constituted part of the collateral for the Note.

LOV obligated itself to purchase the Note from MIC by entering into a loan commitment. The commitment was conditioned on MIC's certifying to LOV that certain prerequisites concerning the Building had been fulfilled (that the Building and 155 accompanying parking spaces had been completed in accordance with plans and specifications and at a cost of no less than $1,050,000; that, on a quarterly reporting basis, construction of the Building was proceeding according to plans; and that two particular tenants had leased and occupied a prescribed amount of space in the Building). MIC certified the foregoing matters and LOV purchased the Note and security agreements.

Shortly thereafter, the borrower on the Note defaulted on the mortgage payments and LOV foreclosed. LOV then learned[2] that the Building had various structural defects, that it varied from approved plans and specifications, that it had only two-thirds of the required parking spaces, and that it was never occupied by the two tenants.

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[2] The point in time at which LOV became aware of certain of these matters was disputed at trial. The dispute is irrelevant for purposes of this appeal.

LOV requested that MIC repurchase the Note and when MIC refused LOV sued MIC and MAC [3] alleging causes of action for: violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; violation of Section 17(a) of the Securities Act of 1933; Texas common law fraud; violation of Article 581-33 of the Securities Act of Texas; fraud in a transaction involving real estate in violation of Tex. Bus. & Comm. Code § 27.01; and breach of contract.

LOV's claims under the federal and Texas securities laws were dismissed by the trial court which held the real estate Note was not a "security." [4] On the eve of trial, LOV sought to amend its claim that the Court rescind the purchase of the Note and sought to substitute instead a claim for consequential damages. When the trial court refused to permit the amendment, LOV did not seek rescission at trial. App. 8a. Thus, LOV was left with two claims which the trial court submitted to the jury by means of a Fed. R. Civ. P. 49(a) special verdict: (1) violation of § 27.01 of the Texas Bus. & Comm. Code; and (2) breach of contract. In connection with and solely as part of LOV's § 27.01 claim, the trial court submitted to the jury a special issue regarding whether, and in what amount, LOV should be awarded exemplary damages. App. 25a-26a. The jury found LOV should be awarded $500,000 in such damages. Post-verdict, the trial court held § 27.01 was inapplicable as a matter of law and denied LOV recovery of exemplary

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[3] MAC was the adviser to the interim construction lender, Murray Mortgage Investors, a publicly held real estate investment trust and affiliate of Murray Financial Corporation, the parent company of MIC and MAC.

[4] LOV did not appeal from this ruling. App. 4a. (Throughout this Petition the abbreviation "App." means the Appendix to this Petition.)

damages because LOV was left with only a breach of contract claim: [5]

> Exemplary damages are recoverable under a breach of contract theory when the Plaintiff proves the existence of a separate tort. Plaintiff's pleadings and questions submitted to the jury only requested findings under Article 27.01, a theory of recovery which I have rejected. Therefore, the jury's verdict does not support a finding of a separate tort, and therefore an award of exemplary damages would be inappropriate. App. 25a-26a.

On appeal, the Fifth Circuit reversed the trial court's denial of exemplary damages on the ground that the facts found by the jury in connection with either the § 27.01 special verdict issues or with the breach of contract issues (the answers to which comprised the elements of Texas common law fraud) were sufficient to form a factual predicate to permit award of exemplary damages under Texas law. App. 9a.

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With A Recent Decision Of The Sixth Circuit As To Whether A Jury's Answer To A Special Verdict Issue Conditionally Submitted And Expressly Limited To A Specific Cause Of Action On Which Recovery Is Barred As A Matter Of Law May Nevertheless Be Used To Support Another Ground Of Recovery For Which The Issue Was Not Submitted To The Jury

The Court should issue a writ of certiorari for two compelling reasons: First, the resolution of the question presented is universally important to all United States District Courts that submit cases to a jury by means of

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[5] The jury also found, in answer to subsequent special issues, that MIC and MAC had breached the loan commitment by making false representations of material fact to LOV on which it relied in purchasing the Note. The trial court awarded actual damages for breach of contract. App. 22a-23a.

Fed. R. Civ. P. 49 special verdicts.[6] This Court has, on no prior occasion, guided the lower courts regarding how the salutary characteristics of Rule 49 may be realized[7] without depriving litigants of due process of law.[8] Second, the decision in the court below conflicts with the recent decision of the Court of Appeals for the Sixth Circuit in *Union Planters National Bank v. Commercial Credit Business Loans*, 651 F.2d 1174 (6th Cir. 1981), *cert. pending* (No. 81-735). This Court should exercise certiorari jurisdiction to bring about a uniformity of decisions among the federal courts of appeals regarding proper application of principles of law to special verdicts rendered by federal juries. (*See, e.g., Avco Corp. v. Aero Lodge*, 390 U.S. 557, 559 (1968), where this Court granted certiorari "because of an apparent conflict" between decisions of the Sixth and Third Circuits.)

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[6] Because use of the special verdict is discretionary with the trial court, *Miskell v. Southern Food Co.*, 439 F.2d 790, 792 (5th Cir. 1971), the frequency with which the question may be encountered is manifold.

[7] The late Judge Jerome N. Frank urged that use of Rule 49 be made compulsory in all civil cases. *Skidmore v. Baltimore & O. R. Co.*, 167 F.2d 54, 67 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948). The current champion of the rule, Judge John R. Brown of the Fifth Circuit, has written extensively on its salutary aspects. *See, e.g.*, Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968). For a compendium of commentaries by distinguished scholars and judges supporting the use of special verdicts, *see* Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199 at n.8 (1966).

[8] The use of special verdicts has been termed "exceedingly treacherous." Green, *The Submission of Special Verdicts in Negligence Cases—A Critique of the Bug Bite Case*, 17 U. Miami L. Rev. 469 (1963). The late Justices Hugo L. Black and William O. Douglas moreover, advocated repeal of Rule 49 on the ground, *inter alia*, that "confusion . . . necessarily results" from its employment. *Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments*, 31 F.R.D. 617, 618-619 (1963).

The question presented for resolution arose in the following factual context: The trial court submitted the case to the jury by means of a special verdict on two of LOV's claims: that MIC and MAC had committed fraud in a transaction involving real estate in violation of § 27.01 of the Tex. Bus. &. Comm. Code and that MIC and MAC had breached the loan commitment by which LOV had obligated itself to purchase the Note from MIC. Special verdict issues Nos. 1-15 were submitted by the trial court solely in connection with LOV's § 27.01 claim. App. 20a. One of the § 27.01 issues, Issue No. 15, dealt with exemplary damages and inquired whether and in what amount such damages should be awarded to LOV. Significantly, Issue No. 15 was *conditionally* submitted. If the jury did not first find that MIC or MAC either conspired to defraud LOV under § 27.01 or that MIC or MAC made a false representation of a past or existing material fact for the purpose of inducing LOV to purchase the real estate Note, the jury was expressly instructed *not* to answer the exemplary damage issue but to proceed to answer the breach of contract issues submitted by the trial court.

The manner in which the exemplary damage issue was submitted was consistent with the trial court's view regarding the recovery of exemplary damages by LOV. App. 21a. In an order issued during trial, the trial court held that if it found § 27.01 to be inapplicable as a matter of law, LOV would be "left with a straight breach of contract claim, and exemplary damages would not be recoverable. . . ." App. 9a. This was so, as a matter of law, because in Texas a breach of contract will not give rise to recovery of exemplary damages. App. 7a. Post-verdict, the trial court did hold § 27.01 was inapplicable to LOV's purchase of the real estate Note from MIC and denied LOV recovery of exemplary damages. App. 25a-26a.

The Fifth Circuit reversed the trial court's denial of exemplary damages. It held that the jury's answers as a whole to the § 27.01 fact issues (Nos. 1-15) or to the breach of contract issues (Nos. 16-23) constituted a sufficient factual predicate for the award of exemplary damages notwithstanding that the exemplary damage special verdict issue was submitted by the trial court *solely* in connection with LOV's § 27.01 claim and that the exemplary damage issue was conditionally submitted.[9] App. 9a.

By contrast, on similar facts the Sixth Circuit reached an opposite result in its recent decision in *Union Planters National Bank v. Commercial Credit Business Loans, supra*, 651 F.2d 1174.[10] In *Union Planters*, the plaintiff Bank sought rescission or damages from defendant for fraudulent representations which induced Bank to purchase a participation in a line of credit. Like LOV in the instant case, Bank sued the defendant under Section 10(b) of the Securities Exchange Act of 1934 and Rule

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[9] The court below also apparently thought it to be authoritative that a Texas intermediate appellate court had held exemplary damages were awardable in a breach of contract action even absent the express pleading of fraud because the pleading set forth averments which, if proven, would support an action in tort. App. 7a. State law, of course, does not control submission of special verdicts and interrogatories by United States District Courts in any respect, whether with respect to the use of a special verdict, *Elston v. Morgan*, 440 F.2d 47 (7th Cir. 1971), what questions to submit, *Travelers Ins. Co. v. Truitt*, 280 F.2d 784 (5th Cir. 1960), the form of the questions, *Southern Pacific R. R. v. Montalvo*, 397 F.2d 50 (5th Cir. 1968), how the jury is to be instructed, *Lowery v. Clouse*, 348 F.2d 252 (8th Cir. 1965), or any other detail of the special verdict and interrogatory practice. *Tucker v. Hughey*, 6 F.R.D. 545 (S.D. Fla. 1947).

[10] *See* opinion at App. 27a-55a. *Union Planters* involved a Rule 49(b) verdict. The rules of law applied in the case are not, however, thereby rendered distinguishable for purposes of the narrow question presented in this Petition.

10b-5 thereunder and under Tennessee common law negligent fraud. App. 28a. The jury was submitted three special verdict issues; the first dealt with the federal securities law claims and the second and third dealt with the Tennessee common law negligent fraud claim and an affirmative defense of contributory negligence. The jury found the defendant committed federal securities law fraud but also found Bank was contributorily negligent.

Post-verdict, the *Union Planters* trial court, like the trial court in the instant case, held the federal securities law claims inapplicable on the ground that the loan participation purchased by Bank was not a "security" and denied recovery as a matter of law on common law negligent fraud because the jury had found Bank was contributorily negligent. Thus barred from recovering under its common law negligent fraud theory, Bank moved the trial court to alter or amend the judgment to award recovery under Tennessee common law *intentional* fraud on the theory that the jury's affirmative answer to the federal securities claim perforce would support a recovery under the Tennessee common law claim of intentional fraud. App. 50a. The trial court denied the motion.

Unlike the decision in the court below, the Sixth Circuit rejected Bank's request to utilize the federal securities claim jury issue as a predicate for recovering for intentional fraud (just as the trial court in the instant case rejected LOV's attempt to use the § 27.01 exemplary damage issue as a predicate for recovering exemplary damages on an alternate theory). The Sixth Circuit correctly affirmed the trial court's ruling "that the loan participation was not a security thereby eclips-[ing] the jury's answer to Special Verdict No. 1, [and] requiring a judgment for the defendant." App. 53a. Moreover, the Sixth Circuit noted, Bank's request for jury instructions only pertained to common law *negligent* fraud and the jury did not receive a special

verdict regarding *intentional* fraud. App. 54a. Likewise, in the instant case the jury did not receive an issue concerning exemplary damages for breach of contract and the § 27.01 exemplary damage award cannot, under the decision in *Union Planters*, be transposed for this purpose.

The rationale of *Union Planters* and the decision below cannot be reconciled. This Court should issue a writ of certiorari to resolve a universally significant question regarding submission and utilization of special verdicts under Fed. R. Civ. P. 49.

CONCLUSION

Petitioners respectfully pray that this Court grant this Petition for a Writ of Certiorari to resolve a conflict between two circuits on a question of universal importance to all federal trial courts that utilize Fed. R. Civ. P. 49 special verdicts.

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Dated October, 1981

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 79-3266

THE LIFE INSURANCE COMPANY OF VIRGINIA,
Plaintiff-Appellant
Cross-Appellee,

v.

THE MURRAY INVESTMENT COMPANY and
MURRAY ADVISORY CORPORATION,
Defendants-Appellees
Cross-Appellants.

May 29, 1981

Appeals from the United States District Court
for the Northern District of Texas

Before RUBIN and GARZA, Circuit Judges, and SUTTLE *, District Judge.

GARZA, Circuit Judge:

This case involves the purchase of a real estate note by the Life Insurance Company of Virginia (LOV) plaintiff-appellant from The Murray Investment Company (MIC) and Murray Advisory Corporation (MAC) defendant-appellees, cross-appellants. The trial resulted in judgment for LOV from which all parties now appeal. Only for the purpose of context in discussing those issues on appeal which we believe meritorious do we set forth a brief statement of the facts.

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* District Judge of the Western District of Texas, sitting by designation.

I.

LOV, a life insurance company, as part of its investment program, purchased long-term real estate notes. Over the years LOV had business relations with Home Mortgage, a real estate financing company. Shortly before the transaction involved here, Home Mortgage merged into MIC and on April 18, 1973, LOV and MIC entered a Correspondent Loan Agreement whereby MIC was to submit loan applications to LOV and service, on behalf of LOV, any loans purchased by LOV.

During April, 1973, Home Mortgage had forwarded to LOV a loan application for long-term real estate financing from the Gar-Dal Venture (later to become Gar-Dal, Inc.) for the purchase of real estate in Dallas and construction of a 52,064 square foot office building thereon. MIC took over the processing of this loan application after the merger.

The transaction was structured for LOV to purchase a complete loan package including a note and all applicable security agreements from MIC after all construction was complete. Pursuant to this proposed loan, MIC sent plans and specifications for the building to LOV for its approval. Soon thereafter LOV approved the terms of the transaction and the parties' obligations were set forth in a Loan Commitment in which LOV obligated itself to purchase the first mortgage loan on the Gar-Dal Venture from MIC. However, as a prerequisite to LOV's obligation to purchase the mortgage, certain conditions were to be fulfilled including that (1) the building and 155 parking spaces be completed according to plans at cost of no less than $1,050,000; (2) MIC was to furnish quarterly reports certifying construction was proceeding according to plans; (3) upon completion MIC was to certify that all construction had been completed according to plans; and (4) that Hamby & Shaver lease and occupy 20,000 square feet of the

building. After the Loan Commitment was signed, MIC arranged for interim financing from Murray Real Estate Investment Trust which in turn utilized the services of MAC as its advisor and working arm in the management of real estate loans.

After commencement of construction, MIC sent the required quarterly inspection reports to LOV, however, most of the inspection reports had been prepared by MAC. Over the next year LOV received reports from officers of both MAC and MIC stating that all construction was proceeding "according to plans and specifications", "quality and workmanship have been superior", and the project was progressing "extremely well". LOV was advised by MIC that construction had been completed and after inspection had been found to have been constructed in accordance with plans and specifications. No representative from LOV ever inspected the project site, but upon the representations of MIC and MAC the final inspection report, and the completion certificate, LOV decided to purchase the loan. The loan was transferred and collateral assigned to LOV on December 3, 1974. On December 17, 1974, LOV paid $1,050,000 for the note.

Following the purchase of the loan, Gar-Dal, Inc. made one monthly mortgage payment and thereafter defaulted. LOV accelerated the indebtedness of the loan. Shortly thereafter, LOV first learned that Gar-Dal, Inc. had run into trouble because it had run out of money for tenant improvements. Prior to receiving this information LOV had been told that the principals of Gar-Dal had substantial net worth. Under further investigation LOV learned that the building and real improvements had substantial defects and did not comply with the plans and specifications. Following the default, LOV requested that MIC buy back the loan but MIC refused. A public foreclosure sale was held and LOV purchased the property for $750,000.

Among the defects was a large, unsightly, twenty-foot deep ditch bordering the property which severely limited access to the building and reduced parking by one-third of that required by the plans. In addition, it was learned that Hamby and Shaver had never taken occupancy of any part of the premises. Furthermore, many deviations from the plans had occurred and much of the construction was defective. LOV further learned that both MIC and MAC, prior to LOV's purchase of the loan, knew the facts about the ditch, parking conditions, non-occupancy of the building, cost over-runs and other deviations and defects.

II.

LOV filed this lawsuit setting forth causes of action for common law fraud and conspiracy to defraud; fraud in a transaction involving real estate in violation of Texas Statute, Tex. Bus. and Comm. Code Ann. § 27.01; tortious breach of contract and conspiracy to bring about such breach of contract; violation of Article 581-33 of the Securities Act of Texas; violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and violation of Section 17(a) of the Securities Act of 1933. The District Court dismissed the claims under the Texas Securities Act, the Securities Exchange Act, and the Securities Act of 1933, holding that the note purchased was not a "security".[1]

Pursuant to its common law fraud cause of action, LOV initially sought rescission of the loan purchase. However, three days prior to trial LOV alternatively sought consequential damages. The District Court refused to permit LOV to replead consequential damages holding that MIC and MAC would be placed in an unfair position because they would not have had proper discovery concerning the consequential damage claims.

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[1] LOV does not now complain of the District Court's dismissal of these causes of action.

The jury found that MIC had breached its contract by falsely representing (1) that the property was constructed and completed according to plans; (2) that Hamby and Shaver occupied their leased portion of the building; (3) the quarterly inspection reports. The jury further found that MIC and MAC knew the representations were false when made, that the representations were material to the contract, and that each representation was relied upon to the detriment of LOV. The jury further found that MIC and MAC had conspired to make the false representations. The jury found that the difference between the fair market value of the note was $300.000 less than was paid for it and that 50% of such difference was proximately caused by at least one of the false representations made by MIC and at least one false representation made by MAC.[2] Lastly, in conjunction with the Section 27.01 questions, the jury found that exemplary damages should be awarded in the amount of $500,000. The District Court instructed the jury that exemplary damages may be awarded as punishment for a wrongful act done "willfully." The District Court instructed the jury that a "willful" act is done knowingly, intentionally, deliberately or designedly.

Following the jury's verdict, the District Court awarded actual damages in the amount of $300,000 jointly and severally against MIC and MAC plus post-judgment in-

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[2] The jury also found that both MIC and MAC had committed every element of common law fraud and every element of fraud in a transaction involving real estate as prohibited by Section 27.01. The District Court ruled that Section 27.01 was not applicable to the transaction here because no *sale* of real estate was involved as contemplated by the statute. LOV has raised this holding as an issue on appeal. After careful consideration of the Texas case law, we are convinced the statute reaches only those transactions involving the actual or potential sale or purchase of real estate and, therefore, we hold that the District Court was correct in its finding that Section 27.01 is not applicable to the transaction here involved.

terest.[3] The District Court refused to award exemplary damages holding that LOV had proved only a breach of contract—not a separate tort as required under Texas law. Lastly, the District Court denied attorney's fees on the basis that Article 2226, V.A.T.S. did not allow attorney's fees to corporations at the time this suit was filed.

III.

On Appeal LOV contends that the District Court erred in (1) refusing to award attorney's fees, and (2) refusing to award exemplary damages.

A.

In support of this latter issue, LOV contends exemplary damages were awardable based upon the jury's finding of tortious breach of contract, common law fraud and conspiracy to defraud. Specifically, LOV argues that, under Texas law, if the act complained of constitutes both a breach of contract and a willful tort, exemplary damages are recoverable. Secondly, LOV argues that the jury findings of all elements of common law fraud including the fact that MIC and MAC knew their representations were false at the time they were made, also stands as a basis for exemplary damages. Lastly, LOV

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[3] LOV on appeal argues it was entitled to prejudgment interest. We find the District Court did not err in refusing to award prejudgment interest. In Texas pre-judgment interest is recoverable as a matter of right only when damages are established as of a definite time and the amount of damages is definitely determinable. *Black Lake Pipeline Co. v. Union Construction Co.*, 538 S.W.2d 80 (Tex. 1976). In this case, both the measure (the difference between the value of the note and the value of the note as represented) and the amount of damages was entirely dependent upon resolution of factual issues by the jury and therefore the amount was not definitely determinable prior to trial. We do not reach the issue of whether or not LOV's failure to specifically plead for pre-judgment interest would defeat its claim under either Texas law or federal pleading requirements. *See Republic National Bank of Dallas v. Northwest National Bank of Fort Worth*, 578 S.W.2d 109 (Tex. 1978) (collected authorities).

argues that the jury findings of conspiracy to defraud also supports an award of exemplary damages.

In Texas the general rule is that a breach of contract will not give rise to a recovery of exemplary damages. However, if the act complained of constitutes *both* a breach of contract and a willful tort, exemplary damages are recoverable. *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963); *Roy Gladen Buick, Inc. v. Sterling*, 524 S.W.2d 590 (Tex. Civ.App.—Waco 1975, writ ref'd n.r.e.); *Export Insurance Co. v. Herrera*, 426 S.W.2d 895 (Tex.Civ.App.—Corpus Christi 1968, writ ref'd n. r. e.); *Briggs v. Rodriguez*, 236 S.W.2d 510 (Tex.Civ.App.—San Antonio 1951, writ ref'd n.r.e.); *See Kingsley v. Baker/Beech Nut Corporation*, 546 F.2d 1136 (5th Cir. 1977). It is not necessary that the tort and contract claims arise out of separate and distinct transactions, but only that the transaction be actionable as a tort in addition to breach of contract. *Crutcher-Rolfs-Cummings, Inc. v. Ballard*, 540 S.W.2d 380 (Tex.Civ.App.—Corpus Christi 1976, writ ref'd n. r. e.), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977). In the recent case of *Amoco Production Co. v. Alexander*, 594 S.W.2d 467 (Tex.Civ.App. —Houston [1st Dist.] 1979, writ granted) the defendant argued that the plaintiff had not pled fraud and that exemplary damages would not be recoverable for the breach of contract even if such breach were accompanied by malice. In rejecting this contention, the court stated "while the foregoing pleading does not specifically allege fraud, it does set forth averments which, if proven, would support an action in tort." The court concluded that exemplary damages could be awarded for tortious breach of contract.[4]

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[4] Although the Texas Supreme Court has granted Writ of Error on several points, including the proposition for which the case is herein cited, a reversal of this point would not require a contrary result in this case.

As with a tortious breach of contract, in Texas exemplary damages could be awardable for common law fraud where the misrepresentation is made willfully and with knowledge of its falsity at the time made. *Baker v. Moody*, 219 F.2d 368 (5th Cir. 1955); *Griffin v. Phillips*, 542 S.W.2d 432 (Tex.Civ.App.—Eastland 1976, writ ref'd n. r. e.); *Success Motivation Institute Inc. v. Lawlis*, 503 S.W.2d 864 (Tex.Civ.App.—Houston [1st Dist.] 1973, writ ref'd n. r. e.).

MIC and MAC defend the District Court's denial of exemplary damages by contending that the special issues submitted to the jury regarding fraud[5] were only submitted pursuant to the Section 27.01 cause of action and, since Section 27.01 is not available as a method for recovery, the jury findings of fraud may not serve as a basis for the tortious conduct necessary for an award of exemplary damages. The defendants also contend that, because the District Court refused LOV permission to amend its pleading to include consequential damages based upon fraud and because LOV did not at trial seek rescission based upon fraud, the issue of common law fraud was effectively removed from the case.

Taking this latter argument first, an examination of the record clearly indicates that, while LOV's original or subsequent complaints do not specifically set forth a claim for relief entitled "common law fraud", the Complaints clearly plead facts which, if proven, would constitute common law fraud and such facts were incorporated by ref-

[5] The jury specifically found that MIC and MAC made and conspired to make false representations for the purpose of inducing it to purchase the note; that such false representations were of a past or existing material fact and were relied upon by LOV in purchasing the note; that such false representations were of facts required by the terms of the Loan Commitment; that such false representations were the proximate cause of damage to LOV; and that the false representations were known to be false at the time they were made.

erence within LOV's Breach of Contract claim for relief. As previously mentioned, the District Court refused LOV's request to amend to seek consequential damages based upon a common law fraud theory because the defendants lacked adequate discovery concerning such measure of damages. However, the Court did not remove the factual basis of fraud which had been pled and upon which the Breach of Contract cause of action was based. We find that LOV's pleadings were sufficient to raise the fraud as a basis for its breach of contract cause of action.

Regarding the defendant's first argument, it is true that the District Court expressed doubt as to the applicability of Section 27.01 as a cause of action. In its Memorandum Opinion, dated April 5, 1979, the Court specifically held that if Section 27.01 were found inapplicable, LOV would be "left with a straight breach of contract claim, and exemplary damages would not be recoverable. . ." We have held (see n.2) that the District Court was correct regarding the inapplicability of Section 27.01. However, the inapplicability of Section 27.01 as a legal remedy in no way negates the fact issues submitted to the jury regarding fraud. Through several special issues the jury found each and every factual element of fraud against both defendants and also found that each knew that their representations were false at the time they were made. We find that the District Court erred in disregarding the jury's findings of fraud as a basis for the tortious conduct necessary for exemplary damages and, under either the tortious breach of contract theory or upon the fraud theory, hold that LOV should have been awarded the exemplary damages as found by the jury.

B.

We now address the issue of attorney's fees. The District Court, by Order dated August 14, 1979, held that LOV could not avail itself of the attorney's fees pro-

visions for breach of contract as provided for in Article 2226 V.A.T.S. The District Court relied on the case of *Adams v. Big-3 Industries, Inc.*, 549 S.W.2d 411 (Tex. Civ.App.—Beaumont 1977, writ ref'd n. r. e) wherein the Texas Court of Civil Appeals held that, since the corporate parties to the lawsuit had entered the disputed contract prior to the 1977 amendment to Article 2226 (allowing corporations to recover attorney's fees in contract actions), the plaintiff corporation could not recover attorney's fees. There being no factual distinction between *Adams* and the case before it, the District Court refused to allow attorney's fees.

In reaching its decision the District Court did not consider the June 6, 1979 amendments to Article 2226 and LOV now asks this court to consider these amendments in support of its claim for attorney's fees. The amendments added to the end of Section 1 this statement: This Act shall be liberally construed to promote its underlying purposes." The amendments also added Section 2 which provides:

> "This Act is remedial in character and is intended to apply to all pending and future actions, regardless of the time of institution thereof or of the accrual of any cause of action asserted."

LOV argues that, since final judgment was not rendered until August 20, 1979, the case was "pending" and therefore a case in which attorney's fees are to be awarded.[6] MIC and MAC, in opposition, argue that the contract was entered into, breached, and this case tried prior to the effective date of the 1979 amendments and thus to apply the 1979 version of Article 2226 to this

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[6] There is no doubt that under Texas law the present case was "pending" at the time of the 1979 amendment. *See Schwartz v. Jefferson*, 520 S.W.2d 881 (Tex. 1975).

case would violate Article I, § 16 of the Texas Constitution which forbids retroactive laws.[7]

There is some merit to appellee's contention. It is true that the Texas Constitution goes further than the United States Constitution since the Texas Constitution forbids all retroactive laws—not simply criminal or penal laws. Indeed, several Texas cases have held that earlier amendments to Article 2226 should be strictly construed and could not be given retroactive effect.[8] However, it is equally true that the Constitution's ban on retroactive laws does not apply to remedial or procedural legislation.[9]

It is the judgment of this Court that the Texas Legislature intended for the attorney's fees provisions of Article 2226 to be given their broadest application by specifically providing Article 2226 to be a remedial statute to be applied to *all pending* actions at the time of its effective date. *See Villiers v. Republic Financial Services, Inc.*, 602 S.W.2d 566 (Tex.Civ.App.—Texarkana 1980, no writ history); *Reynolds v. Allstate Ins. Co.*, 629 F.2d 1111, *modified on rehearing*, 633 F.2d 1208, 1209 (5th

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[7] Article I, § 16 of the Texas Constitution provides:

> "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

[8] In *Government Personnel Mutual Life Ins. Co. v. Wear*, 151 Tex. 454, 251 S.W.2d 525 (1952), the Texas Supreme Court refused retroactive application to the 1949 amendments to Article 2226. In its opinion the Court made its reasoning clear:

> "There is no language used in the Article indicating that it was the intention of the Legislature that such Article should operate retrospectively. If an Act is intended to operate retrospectively, that intention must be clearly shown in the language of the Act and it will not ordinarily be inferred. Had the Legislature intended the amended act should apply [retrospectively] . . . it could have plainly said so." 251 S.W.2d at 529.

[9] *See* Tex.Jur.2d, Constitutional Law §§ 115-131.

Cir. 1981). We believe the plain language of Article 2226 requires allowance of attorney's fees in this case and we, therefore, hold the District Court erred in denying LOV attorney's fees and remand the case for a determination of reasonable attorney's fees.

Finding no merit in the remaining issues on appeal or cross-appeal,[10] the judgment is reversed and remanded for entry of judgment of exemplary damages and for determination of reasonable attorney's fees and is affirmed in all other respects.

AFFIRMED in part; REVERSED and REMANDED in part.

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[10] MIC and MAC on cross-appeal advance three issues against the judgment of the District Court. First, MAC argues that judgment should not have been awarded against it for breach of contract since it was not a party to the loan commitment. Second, both argue there was no legally compensable damage flowing from the breach of contract, therefore, the award of damages was improper. Last, both argue there was insufficient evidence to support the award of actual damages. After reviewing the record and authorities, we find all of these arguments without merit.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 79-3266

THE LIFE INSURANCE COMPANY OF VIRGINIA,
Plaintiff-Appellant
Cross Appellee,

v.

THE MURRAY INVESTMENT COMPANY and
MURRAY ADVISORY CORPORATION,
Defendants-Appellees
Cross Appellants.

July 29, 1981

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(Opinion May 29, 1981, 5 Cir., 1981, 646 F.2d 224)

Before RUBIN and GARZA, Circuit Judges, and SUTTLE *, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby GRANTED to the extent that upon remand of this case to the District Court for a determination of attorney's fees, the District Court shall await the Texas Supreme Court's decision in *First National Bank in Weatherford, Texas v. Exxon Corporation*, 597 S.W.2d 783 (Tex.Civ.App.—El Paso, 1980), *writ granted*, 24 Tex.Sup.Ct.J. 375 (May 9, 1981). If in its holding in

that case the Texas Supreme Court definitively holds that attorney's fees are not properly awardable under the circumstances of this case, the District Court shall not find or award attorney's fees to the Life Insurance Company of Virginia. However, should the Supreme Court of Texas fail to hold contrary to this Court's original opinion, the opinion shall remain as initially written. In all other respects the original opinion of this Court remains as written.

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* District Judge of the Western District of Texas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Cause No. CA3-76-521-F

THE LIFE INSURANCE COMPANY OF VIRGINIA

vs.

THE MURRAY INVESTMENT CO., *et al.*

Filed Aug. 20, 1979

JUDGMENT

The Court finds that judgment should be entered for the Plaintiff based on the verdict as follows:

Plaintiff shall recover actual damages of $300,000.00 plus costs from the Defendants Murray Investment Co. and Murray Advisory Corporation, jointly and severally, plus interest on all amounts at the rate of 9% per annum from the date of judgment until paid;

Defendants shall recover nothing in their claims against Continental Steel Co. and Continental Steel Co. shall recover its costs from the Defendants.

It is hereby Ordered, adjudged and Decreed that Plaintiff the Life Insurance Co. of Virginia have judgment as stated herein against the Murray Investment Co. and The Murray Advisory Corp. jointly and severally.

Signed and entered this 20th day of August, 1979.

/s/ Robert W. Porter
United States District Judge

Date August 20, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Cause No. CA3-76-521-F

THE LIFE INSURANCE COMPANY OF VIRGINIA

vs.

THE MURRAY INVESTMENT CO., *et al.*

Filed Aug. 20, 1979

ORDER

On August 14, 1979 this Court entered its judgment in this case, which judgment contained a typographical error in the third paragraph, to wit, the word "Plaintiff" should have read "Defendants". In addition, the Court failed to tax costs in the judgment. Therefore the Court is today entering a new amended judgment to correct the August 14, 1979 judgment.

It is so Ordered.

/s/ Robert W. Porter
United States District Judge

Date August 20, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-76-521-F

THE LIFE INSURANCE COMPANY OF VIRGINIA

vs.

THE MURRAY INVESTMENT CO., *et al.*

Filed Aug. 14, 1979

JUDGMENT

The Court finds that judgment should be entered for the Plaintiff based on the verdict as follows:

Plaintiff shall recover actual damages of $300,000.00 from the Defendants Murray Investment Company and Murray Advisory Corporation, jointly and severally, plus interest on all amounts in this judgment at the rate of 9% per annum from the date of judgment until paid;

Plaintiff shall recover nothing in its claims against Continental Steel Company.

It is hereby ORDERED, ADJUDGED AND DECREED that Plaintiff The Life Insurance Company of Virginia, have judgment as stated herein against The Murray Investment Company and The Murray Advisory Corporation, jointly and severally.

Signed and Entered this 14th day of August, 1979.

/s/ Robert W. Porter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-76-521-F

THE LIFE INSURANCE COMPANY OF VIRGINIA

vs.

THE MURRAY INVESTMENT CO., *et al.*

Filed Aug. 14, 1979

ORDER

The Court has reviewed the Plaintiff's motion for attorneys' fees and the evidence presented to the Court on the question of attorneys' fees. Plaintiff takes the position that it is entitled to recover attorneys' fees under its breach of contract claim pursuant to an amendment to article 2226, Texas Revised Civil Statutes Annotated (Supplement, 1978-79), which took effect August 29, 1977, over four years after the execution of the contract which was allegedly breached, almost three years after Plaintiff's cause of action arose against the Murray Defendants, and over two years after this law suit was filed.

I find that Plaintiffs may not avail themselves of the benefits of this statute. *Adams vs. Big-3 Industries, Inc.*, 549 S.W.2d 411 (Tex.Civ.App.—Beaumont, 1977, writ ref'd n. r. e.). In *Adams*, the court construed the applicability of a prior amendment to article 2226 which permitted corporations to recover attorney's fees. The trial court disallowed attorney's fees on the grounds that at the time of the making of the contracts at issue corporations could not recover attorney's fees, and the *Adams* Court agreed.

Therefore, I find that Plaintiffs may not recover attorney's fees under the breach of contract claim. I have previously held that Plaintiffs may only recover in this case under a breach of contract theory, and therefore, it is not necessary to discuss the possible award of attorney's fees under article 27.01, or the Federal or State Securities laws. I hereby deny Plaintiff's application for attorney's fees as a matter of law.

It is so ORDERED.

/s/ Robert W. Porter
United States District Judge

Date August 14, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-76-521-F

THE LIFE INSURANCE COMPANY OF VIRGINIA

vs.

THE MURRAY INVESTMENT CO., *et al.*

vs.

CONTINENTAL STEEL CO.

[Filed May 14, 1979]

MEMORANDUM OPINION

On April 12, 1979 the jury returned its verdict to the Court. Questions 1 through 15 of the charge were submitted under Plaintiff's theory of recovery based on Article 27.01 of the Texas Business & Commerce Code.

The legislative history of the Business and Commerce Code indicates the legislature's intent not to change the meaning of Article 4004 (the predecessor of § 27.01) when § 27.01 was enacted, and clearly under Article 4004 (and thus under § 27.01) this is not a transaction that falls within the parameters of the statute. *See Thompson v. American Power & Light Co.*, 192 F.2d 652, 653 (5th Cir. 1951); Tex.Laws 1919, Ch. 43, § 4 at 77; Texas Legislative Council, 60th Legislature, Accompanying Document to House Judiciary Committee Report of April 19, 1967 on H.B. 293; Tex. Laws 1967, Ch. 785, § 2, at 2619. Also, the measure of damages prescribed by the statute is inapplicable to this case because it applies to sales of real estate.

I have already indicated in previous memorandum orders that I did not believe that this case concerned a "transaction involving real estate". I am still of that opinion because there was no sale of real estate in this case (other than the foreclosure sale).

Plaintiff's primary complaint in this case concerns certain false representations of past or existing material facts required by the terms of the loan commitment, and all of Plaintiff's allegations arise from its loaning of money to finance the building. Article 27.01 was not intended to cover and does not cover commercial loans of the type presented in this case.

Therefore, I reject as a matter of law Plaintiff's entitlement to recovery under Article 27.01 of the Texas Business & Commerce Code, and all jury findings (findings in questions 1 through 15) that relate to that cause of action under Article 27.01. See previous orders and *Nolan v. Bettis*, 577 S.W. 2d, 551, 556 (Tex.Civ.App.—Austin, 1979, no writ).

In rejecting the § 27.01 claim, I also reject Plaintiff's entitlement to recovery for conspiracy to defraud (See Jury's response to Question No. 1) under § 27.01, and any entitlement to recovery under a theory of common law fraud. As I have stated before, I have not permitted Plaintiff to include a common law fraud claim solely for recovery of damages because the measure of damages recoverable for common law fraud was not previously present in the case. Until the eve of trial Plaintiff had requested rescission because of the alleged fraud. Permitting Plaintiff to suddenly replead common law fraud with consequential and other damages would have placed the Defendants in a fundamentally unfair position, because they would not have had proper discovery on these new damage claims. Allegations of fraud must be plead with specificity, and Plaintiff failed to plead its common law fraud allegations with specificity in its complaint

if it had intended to plead consequential damages resulting from the frauds, or damages in the alternative to rescission.[1]

Plaintiff also had a claim for breach of contract. The jury found that: Murray Investment Company breached its contract by falsely representing to Life Insurance Company of Virginia that the property was substantially constructed and completed according to the plans and specifications which were submitted at the time of the application for the permanent loan (answer to question 16(f)); Murray Investment Co. breached its contract by making false representations to Life Insurance Company of Virginia in quarterly inspection reports (Answer to question 16(f)); and Murray Investment Co. falsely represented that Hamby and Shaver accepted and occupied the premises upon completion of construction of the building. (Answer to question 16 (d)). These representation or omissions were known by Murray Investment Co. and Murray Advisory Corporation at the time they were made (Answer to Question 17(a), (d), (f)), were material to the contract (Answer to Question 18(a), (d), (f)), and were relied upon by Life Insurance Company of Virginia. (Answer to Question 19(a), (d), (f)). The jury found that because of these breaches of the contract, there was a difference of $300,000 between the amount of the note ($1,050,000)

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[1] The Court hereby denies Plaintiff's request that the Court reconsider its earlier ruling that as a matter of law the transaction in this case does not involve a security. I reject the reasoning of the Court in First Federal Savings & Loan Association of Miami v. Mortgage Corporation of the South, —— F.Supp. —— (D. Ala. 1979), 1979 Fed. Sec.L.Rep. (CCH) § 96, 818 (April 20, 1979) as being inconsistent with the law in the Fifth Circuit and the facts in this case. Plaintiff has admitted that the verdict of the jury would support a finding of liability under the federal or state securities laws; therefore, if I am in error concerning the law on this point, a retrial will not be necessary and the Fifth Circuit can render its decision.

and the actual fair market value of the note on December 17, 1974 (Answer to Question 21), and that 50% of this sum was proximately caused by the false representations of Murray Advisory Corporation. (Answers to Questions 22 and 23).

On the basis of these answers, I will enter judgment against Murray Investment Co. and Murray Advisory Corporation in the amount of $300,000.00.[2]

The jury also answered certain questions relating to Murray Investment Co. and Murray Advisory Corporation's third party claim against Continental Steel Co. The Murray defendants apparently attempted to establish the liability of Continental Steel on a tort theory, because they did not introduce the contract between Continental Steel and Jones, or request any jury questions relating to a contract theory. The Murray defendants alleged in their third party complaint:

> ". . . Continental knew, or had reason to know, that the building constituted a part of the security for the financing for the building which was evidenced by said note. Continental also knew, or had reason to know that Murray Investment and Murray Advisory expected the building to be constructed substantially in accordance with plans and specifications provided by Gar-Dal, Inc. Continental thus owed a duty to Murray Investment and Murray Advisory to perform its agreement in a workmanlike manner and in accordance with the plans and specifications."

The jury was asked in question 25, "Do you find from a preponderance of the evidence that Continental Steel

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[2] Defendants' motion for judgment n.o.v. is hereby denied on this point. Plaintiff is not entitled to prejudgment interest pursuant to either of the two theories of recovery submitted to the jury; therefore, Plaintiff is not entitled to recovery of prejudgment interest. Plaintiff also failed to properly plead recovery of prejudgment interest.

knew or should have known that the building was collateral for a loan?" The jury responded, "No". Thus, the Murray defendants failed to establish any duty of performance on the part of Continental Steel, which was an essential element of their case. *Coleman v. Hudson Gas & Oil Corp.*, 455 S.W.2d 701 (Tex. 1970).

Continental Steel also established the affirmative defenses of ratification and waiver, when the jury found in answers to questions 32 and 33 that Murray Investment Co. and Murray Advisory Corp. had ratified Continental's failure to fabricate and erect the steel in a good and workmanlike manner and had also waived any complaints they had with respect to Continental's failure to fabricate and erect the steel in a good and workmanlike manner. By virtue of their ratification of Continental's steel work, the Murray defendants are not entitled to recover over against Continental Steel for any part of the damages caused to Plaintiff by Continental's failure to proper fabricate or erect the steel. *Morgan Warehouse & Commercial Co. v. Gilbert Mfg. Co.* 60 S.W.2d 1053 (Tex.Civ. App. 1933, writ ref'd); *Hays v. Marble*, 213 S.W.2d 329 (Tex.Civ.App. 1948, writ dismissed); *Lynch Davidson & Co. v. Denman Lumber Co.*, 272 S.W.803 (Tex.Civ.App. 1923, no writ). The Murray defendants' waiver of their complaints about Continental Steel's work precludes them from obtaining any relief from the third party action. *The Praetorians v. Strickland*, 48 S.W.2d 690 (Tex.Civ. App. 1932), *rev'd on other grounds*, 66 S.W.2d 686 (Tex. Comm.App. 1933); *Phillips v. Lee Le Gallez*, 329 S.W.2d 922 (Tex.Civ.App. 1959, no writ); *Ketchey v. West*, 326 S.W.2d 40 (Tex.Civ.App. 1959, No writ).

Finally, a party's failure to perform a contract gives rise to a cause of action only in favor of those who are parties to the contract or in privity thereto. *B & C Construction Co. v. Grain Handling Corp.*, 521 S.W.2d 98 (Tex.Civ.App. 1975, no writ). This rule is applicable to

claims based on contract and tort theories, *id*, but in this case there is no evidence that the Murray defendants were parties to the subcontract between Continental Steel and Jones or that the subcontract was made for their benefit or for the benefit of any party other than Continental Steel and Jones. There is also no evidence as to the terms of the subcontract between Continental Steel and Jones, other than Jones' testimony that he and Continental Steel were the parties to the contract.

Since there was no evidence that the Murray defendants were privy to the subcontract between Continental Steel and Jones, the Murray defendants failed to make a prima facie case, and Continental Steel is entitled to judgment as a matter of law. *B & C Construction Co. v. Grain Handling Corp., supra; Republic National Bank v. National Bankers Life Insurance Co.*, 427 S.W.2d 76 (Tex.Civ.App. 1968, writ ref'd n.r.e.). Therefore, Continental Steel is entitled to judgment on the verdict in its favor, or, alternatively, under the evidence presented Continental Steel is entitled to judgment in its favor because Continental Steel owed no duty of performance to the Murray Defendants as a matter of law.

Plaintiffs had a claim against the Murray defendants for exemplary damages. Exemplary damages are recoverable under Article 27.01 of the Texas Business & Commerce Code when it is shown that a wrongful act under Art. 27.01 is done willfully, and the jury determines that an amount should be awarded as exemplary damages as an example to others and by way of penalty. A jury awarded the plaintiff $500,000 as exemplary damages. Because I have held as a matter of law that the Plaintiff cannot recover under Art. 27.01, Plaintiff cannot recover exemplary damages under 27.01.

Exemplary damages are recoverable under a breach of contract theory when the Plaintiff proves the existence of a separate tort. Plaintiff's pleadings and questions

submitted to the jury only requested findings under Article 27.01, a theory of recovery which I have rejected. Therefore, the jury's verdict does not support a finding of a separate tort, and therefore an award of exemplary damages would be inappropriate.

The Court hereby sets a hearing on Plaintiff's request for attorney's fees on May 29, 1979 at 10:00 a.m., after which hearing I will enter a final judgment. I make no ruling at this time as to whether or not Plaintiff is entitled as a matter of law to attorney's fee[s.]

It is so ORDERED.

/s/ Robert W. Porter
United States District Judge

Date May 14, 1979

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 79-1191

UNION PLANTERS NATIONAL BANK OF MEMPHIS,
Plaintiff-Appellant,
v.
COMMERCIAL CREDIT BUSINESS LOANS, INC.,
Defendant-Appellee.

Argued Oct. 15, 1980

Decided May 18, 1981

Rehearing Denied July 20, 1981

Glen Reid, Jr., Robert M. Johnson, Wildman, Harrold, Allen, Dixon & McDonnell, Memphis, Tenn., for plaintiff-appellant.

J. Alan Hanover, Michael E. Goldstein, Hanover, Walsh, Barnes & Jalenak, Memphis, Tenn., for defendant-appellee.

Before ENGEL and KEITH, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

The principal issue in this case is whether a loan participation agreement executed between two financial institutions constitutes a "security" within the meaning of the Securities Exchange Act of 1934.

I.

Plaintiff, Union Planters National Bank of Memphis (the Bank) appeals from a judgment notwithstanding the verdict and the conditional grant of a new trial entered in favor of the defendant, Commercial Credit Bus-

iness Loans, Inc.[1] (CCBL). In its complaint the Bank sought recission or damages from CCBL for allegedly fraudulent representations made by CCL's agents which induced the Bank to purchase a participation in a line of credit extended by CCBL to Donald Furniture Co. (Donalds). Specifically, the Bank alleged that the loan participation agreement constituted a "security" under federal law and that CCBL made false statements of material fact, omitted to state material facts necessary to make the statements not misleading, and employed a device, scheme or artifice which operated as a fraud upon the Bank, all in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. sections 78j (1970),[2] Rule 10b-5 of the Securities and Exchange Com-

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[1] When a trial court grants judgment notwithstanding the verdict and grants a new trial in the alternative, the judgment notwithstanding the verdict is final and appealable, allowing us to review both rulings. *See* Fed.R.Civ.Pro. 50(c)(1).

> This departure from the normal rule that a motion granting a new trial is interlocutory and non-appealable is justified by the obvious fact that the principal judgment is clearly final; the new trial grant will never be effective unless the judgment is overthrown. Since the principal judgment is appealable, it would be wasteful to hold that the court of appeals cannot review all that happened below in the event that it holds the grant of judgment notwithstanding the verdict to have been erroneous.

9 Moore's Federal Practice Sec. 110.08[3], at 122 (2d ed. 1948). Accordingly, we have jurisdiction to consider both the judgment notwithstanding the verdict and the conditional grant of a new trial. *See e.g., Bazile v. Bisso Marine Co., Inc.*, 606 F.2d 101, 104 (5th Cir. 1979), *cert. denied*, —— U.S. ——, 101 S.Ct. 94, 66 L.Ed.2d 33 (1980).

[2] 15 U.S.C. Sec. 78j provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails

(b) To use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any

mission, 17 C.F.R. section 240.10b-5,[3] and principles of Tennessee common law.

The district court initially held that the loan participation agreement was a security and allowed the Bank to present evidence on its federal law claims.[4] After six days of trial CCBL declined to offer any proof and the case was submitted to the jury together with three special verdicts.[5] The jury found in favor of the Bank on

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security not to registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[3] 17 C.F.R. Sec. 240.10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[4] Prior to trial the district court granted CCBL's motion to dismiss the Bank's claim for recission, holding that the Bank had waived its right to recission by continuing to accept payments from CCBL under the terms of the agreement.

In response to other CCBL motions, the court severed the issues of liability and damages, and ruled that simple negligence does not violate the federal securities laws. *See e.g. Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428-31 (6th Cir.), *cert. denied sub nom., Adams v. Peat, Marwick, Mitchell & Co.*, —— U.S. ——, 101 S.Ct. 795, 66 L.Ed.2d 611 (1980).

[5] 1. Did the defendant violate the United States laws and regulations pertaining to the sale of securities by making an untrue statement of a material fact or by omitting to state a necessary

the federal securities count and the Tennessee negligent misrepresentation fraud claim, but also found the Bank guilty of contributory fault which proximately caused its injury. Judgment on the federal law liability issue was entered in favor of the Bank and a judgment in favor of CCBL was entered on the common law fraud claim because contributory negligence is a defense to the tort of negligent fraud. CCBL then moved for a judgment notwithstanding the verdict or for a new trial, and the Bank moved to alter or amend the judgment on the Tennessee common law count. Subsequently, the trial judge granted CCBL's motion for JNOV on the grounds that he had changed his mind and was now ruling that the participation purchased by the Bank was not a security. A conditional new trial was also granted on that issue because of what the trial judge felt were substantial errors in the formulation of the special verdicts and in the admission of certain testimony. We affirm the judgments entered for CCBL on the federal and state law claims.

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material fact concerning the credit-worthiness of the accounts receivable of Donald Furniture Co., Inc. in connection with the negotiation for and the execution of Amendment No. 1 to Participation Agreement dated July 11, 1973?

Yes —— No ——

2. Did the defendant commit commercial fraud against the plaintiff under the law of Tennessee by making a negligent misrepresentation concerning the credit-worthiness of the accounts receivable of Donald Furniture Co., Inc. in connection with the negotiation for and the execution of Amendment No. 1 to Participation Agreement dated July 11, 1973?

Yes —— No ——

If you answer the above question "Yes", please answer the following question in the light of the instructions pertaining to the cause of action under the Tennessee law.

Was the plaintiff guilty of contributory fault which proximately caused an injury to the plaintiff?

Yes —— No ——

II.

Donald Furniture Company was a retail seller of home furnishings. Its relationship with the Bank dated back to 1946, when the Bank began lending money to Donalds. Those loans were secured by the company's accounts receivable. In 1968, Donalds was sold by its founders and owners, the Pelts family, to Gulf Life Insurance Company. In 1971, Donalds had an outstanding loan of $700,000.00 from the Bank, secured by a take-out commitment from Gulf Enterprises, the holding company for Gulf Life. Gulf Life eventually sold the Donald chain to Tenn-Ark Furniture World Corp. in 1972.

During the years 1946-1971, Donalds had experienced substantial growth and in 1971 sought new financing in the amount of $2 million. On October 21, 1971 two Donald's officials approached Mr. C. W. Irvine, the Union Planters officer in charge of the Donald's account, regarding the possibility of the Bank participating with a finance company (CCBL) in a loan to Donalds. The Bank's participation was solicited because the Bank's interest charges were lower than CCBL's. Shortly thereafter, Irvine was approached by CCBL's representative, Oscar Edwards, to discuss further the loan participation.

When prospects for consummation of the participation appeared good, Donalds and CCBL executed a Revolving Loan Agreement on November 26, 1971. The Revolving Loan Agreement provided that Donald would receive continuous cash advances from CCBL based upon the value of all Donald's existing and future accounts receivable; the accounts receivable would also serve as collateral to secure the loan.

On December 17, 1971, the Bank and CCBL executed a Participation Agreement which provided that the Bank would participate to the extent of providing 50 percent

of the first two million dollars advanced to Donalds. The Bank, in turn, received rights in Donald's accounts receivable commensurate with its 50 percent share of the loan. The collateral security was defined as any and all of Donald's accounts receivable. The value of that collateral was to be determined solely by CCBL, which was given, in the words of the trial judge, "practically unlimited discretion" in its role as lead bank administering the loan. The extent of CCBL's primacy in managing the loan to Donalds is reflected in Paragraph 7 of the Participation Agreement:

> 7. Commercial credit may in its sole discretion approve or decline to approve the credit risk on and acceptability of Collateral; take, release, substitute or refuse Collateral or other security; give or withhold waivers, consents, extensions, adjustments, compositions or compromises; amend or refuse to amend the Financing Agreement or other agreements relating thereto; exercise or refrain from exercising rights, or take or refrain from taking action with respect to Advances, Collateral, other security or with respect to the Financing Agreement, or in any other way in making, handling, collecting, realizing upon, or enforcing repayment of Advances or Collateral or other security or the Financing Agreement of guaranties; and, without limitation, Commercial Credit makes no representations and assumes no responsibility with respect to Collateral, the Financing Agreement or other papers relating thereto, or to their value, validity or enforceability, or the correctness of any papers, statements or certificates made by the Customer.

The Participation Agreement also provided that the Bank would have access, upon request, to all CCBL records with regard to the loan; CCBL was obligated,

however, to deliver to the Bank periodic statements reflecting the status of Donald's account with CCBL.

By March, 1972, Donalds had received the total two million dollars—one million each from the Bank and CCBL. Donald's need for cash infusion, however, was not satisfied by that loan alone, as CCBL continued lending money to Donalds pursuant to the separate Revolving Loan Agreement it had executed with Donalds. During the course of the next twelve months, CCBL advanced more than five million dollars to Donalds.

In supervising the progress of the loan, audits of Donald's financial records were conducted by a sister company of CCBL, Commercial Credit Management Corp. The primary purpose of these audits was to determine whether there was a proper flow of funds pursuant to the loan. If the audits revealed an unsatisfactory state of affairs, the results would be followed up by the CCBL official in charge of the loans, Frank Mederios.

The audit of August 17, 1972 turned up serious problems with respect to Donald's control over its accounts receivable—the collateral for the loan. Specifically, the auditor found that Donald's had "no control" over those accounts; that Donalds billed for unshipped merchandise making it impossible to establish a dollar value for those receivables; that the company's system of extending and refinancing receivables was not protected by CCBL's audit requirements; and that the company's reporting delays were unreasonable. In order to correct those deficiencies the auditor recommended the implementation of certain procedures to bring about some degree of control over the accounts receivable should CCBL choose to disregard his advice to discontinue the account. Neither the auditor's problematic diagnosis nor his recommendations were contained in the report given the Bank.

Donald's problems had not improved by the next audit on December 16, 1972. The same auditor again advised

against continuing the account, observing that "quantitatively, we do not know what we have . . . . Qualitatively, we are also unaware of our position." The audit report which CCBL forwarded to the Bank was an edited version which did not contain the adverse recommendation made by the auditor.

Several months later it appeared that Donald's situation was improving. The audit report of April 27, 1973, indicated that Donalds had made substantial progress in clearing up the problems associated with its control of the accounts receivable. Unlike the two previous reports, the April audit, authored by a different auditor, recommended that CCBL retain its account with Donalds. And despite any accounting problems, Donalds was apparently a healthy company. Both the Bank and CCBL received copies of the favorable financial statement for the year ending December 31, 1972 prepared by Donald's accountants, Haskins & Sells and dated March 2, 1973.

By April, 1973, Donalds was indebted to CCBL for 7.5 million dollars, in addition to the one million dollars it owed the Bank. At that time CCBL decided to increase the amount of its loan to Donalds by $750,000, raising the debt to $8,250,000. Donalds, however, anticipated a future need for 10 million dollars in credit.

On April 10, 1973, representatives from Donalds met with the Bank's executive, Irvine, and proposed that the Bank increase its participation with CCBL from $1,000,000 to $5,000,000, or $50% of $10,000,000 total, available on a five-year revolving term basis. In the estimate of the Donald's officials, that amount of financing would satisfy their needs for at least two years during which time they expected to raise additional funds by a public stock offering. On April 13, 1973, the Bank advised Donalds that it was agreeable to a 50% participation in the $10,000,000 line of credit at the prime rate plus two points. Consequently, the Loan Participation Agreement

was amended on July 11, 1973 to provide for a $10 million line of credit in which the Bank would have a 50% participation.[6] The Bank was therefore required to pay CCBL $3.2 million, reducing CCBL's exposure by that amount, and bringing the loan balance to $8.4 million. By October 22, 1973 the loan balance had reached the full $10 million.

In December, 1973, Irvine learned that CCBL unilaterally intended to increase Donald's financing to $12.5 million. Irvine contacted Mederios at CCBL to ask about the financing increase and to request copies of any recent audit reports. In a letter to Irvine dated December 28, 1973, Mederios wrote that he would have the final draft of the amendment increasing the line of the loan in about one week, and that CCBL's posture at that time was one of holding off consideration of any further expansion in 1974. In fact, however, CCBL and Donalds had executed the amendment to the Secured Term Loan Agreement over one month beforehand, on November 8, 1973. That amendment, while increasing the credit line, also extended the payout period of the loan. CCBL also forwarded an edited version of an audit of September 12, 1973, which omitted the adverse comments made by the auditor.

In February, 1974, Irvine and the Bank learned that Donalds was delinquent in paying some of its creditors. Irvine forwarded to CCBL a memo from the Bank's credit department, inquiring whether CCBL had similar information. Acording to Irvine's testimony, Mederios

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[6] It was in the circumstances preceding this amendment increasing the Bank's participation to 50% that the alleged fraud (misrepresentations regarding the creditworthiness of Donald's accounts receivable) occurred; the Bank does not contend that there was fraud involved in the execution of the original Participation Agreement. In light of our disposition of the case, we need not decide whether the amendment of the Participation Agreement is "in connection with the purchase or sale of any security."

informed him that several checks had been made which did not show any serious trade slowness. A February 11, 1974, CCBL audit report, however, recommended that CCBL abandon Donalds because the company was delinquent in paying trade creditors. The Bank received a sanitized version of that audit in May, 1974.

In early 1974 Donalds experienced cash flow difficulty. On March 20, 1974, the Bank requested that CCBL repurchase its share of the loan. At that time Irvine believed that the Bank could so terminate its participation at any time. The Agreement, however, only permitted the Bank to decline to participate in future advances; there was no provision permitting it to rescind its involvement with regard to funds already advanced. Citing these provisions, CCBL declined to repurchase the Bank's share of the loan.

Donald's financial health worsened rapidly. By June, Donalds was in default by $1.7 million and delinquencies in the accounts receivable were rising. In September, 1974, Donalds was placed in bankruptcy. The Trustee turned over the accounts receivable to CCBL, which began to collect them, remitting to the Bank its share of the liquidation proceeds. When CCBL continued to refuse to repurchase the Bank's share, the Bank filed this action in February, 1975.

III.

The threshold question in any action brought pursuant to the Securities Acts is whether a security exists. The search for the definition of a "security" must necessarily commence with the language of the statute. *Rubin v. United States*, —— U.S. ——, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring).

Section 3(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78c(a)(10) provides:

> (a) When used in this chapter, unless the context otherwise requires—
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> (10) The term 'security' means any note, stock, treasury stock, bond, debenture, *certificate of interest or participation* in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or *any certificate of interest or participation in*, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grade, or any renewal thereof the maturity of which is likewise limited. (Emphasis supplied.)

The Securities Act of 1933, 15 U.S.C. Sec. 77b(1) provides a similar definition of security, a definition which the Supreme Court has termed "virtually identical" to that of the Securities Exchange Act of 1934. *Tcherepnin v. Knight*, 389 U.S. 332, 335-336, 88 S.Ct. 548, 552-553, 19 L.Ed.2d 564 (1967). While both Acts contain admittedly broad definitions, not every commercial transaction is within their ambit. *See Curran v. Merrill Lynch, Pierce, Fenner and Smith*, 622 F.2d 216, 222 (6th Cir. 1980), *cert. granted* —— U.S. ——, 101 S.Ct. 1971, 68 L.Ed.2d 293 (1981). The literal inclusion of participation within the statutory definition of "security" is not dispositive of the question, however, in view of the provision in both Acts that the definitions apply

"unless the context otherwise requires." [7] In interpreting the Securities Acts, the rules of statutory construction have been subordinated to the doctrine that courts will construe the provisions of a statute in a manner consistent with its dominant purpose and will carry out the generally expressed legislative policy by reading the text in light of the context.[8] *See SEC v. National Securities, Inc.*, 393 U.S. 453, 466 (1969). *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1934). In fact, in determining the scope of the term "security," the Supreme Court has disregarded form in favor of substance and counselled that applica-

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[7] The antiliteralist approach of the Supreme Court in *Forman* and antecedent securities cases is at odds with *Lehigh Valley Trust Co. v. Central National Bank of Jacksonville*, 409 F.2d 989 (5th Cir. 1969), upon which the Bank relies. In *Lehigh Valley* the Fifth Circuit read the statute literally in holding that a participation agreement was a security within the statutes and Rule 10b-5. *Id.* at 992. That literal approach is now discredited even in that circuit. *See McClure v. First National Bank of Lubbock*, 497 F.2d 490, 493-94 (5th Cir. 1974); *Bellah v. First National Bank of Hereford*, 495 F.2d 1109, 1111-14 (5th Cir. 1974).

A new literalism emerged, however, in *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976), where the court found the *Forman* test to be of "dubious value" in the context of deciding whether unsecured subordinated notes purchased by the Exchange National Bank were securities. The best recourse, the court believed, was to follow the language of the Acts, which includes every note with a maturity period over nine months, unless the party asserting that there is no security demonstrates that the context requires otherwise. *Id.* at 1137-38.

[8] The Congressional purpose was capsulized by the Supreme Court in *Forman*, 421 U.S. at 849, 95 S.Ct. at 2059:

> The primary purpose of the Securities Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interests of investors.

tion of the federal securities statutes turns on the "economic realities" underlying a transaction. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848, 95 S.Ct. 2051, 2058, 44 L.Ed.2d 621 (1975); *Tcherepnin v. Knight*, supra at 336. In focusing on the economic realities to distinguish securities transaction from commercial dealings, the Court has used a test which, in "shorthand form":

> . . . embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is (1) the presence of an investment (2) in a common venture (3) premised on a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others.

Forman, supra at 852, 95 S.Ct. at 2060.[9]

In applying the *Howey-Forman* criteria in the context of commercial loan participations, the courts have divided on whether a security exists. A few courts have held that a loan participation is a security. *See Commercial Discount Corp. v. Lincoln First Commercial*

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[9] The genesis of this test is *SEC v. W. J. Howey Co.*, 328 U.S. 293, 301, 66 S.Ct. 1100, 1104, 90 L.Ed. 1244 (1946) and the only deviation from the *Howey* language is the omission of the prefatory term "solely" from the phrase "profits to come solely from the efforts of others." *Id.* at 301, 66 S.Ct. at 1104. Several courts have interpreted the "solely" requirement to mean only that the "crucial" profit making efforts be made by a third party. *Commander's Palace Park v. Girard & Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir. 1974); *SEC v. Glenn W. Turner Enterprises*, 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973). The Supreme Court declined to adopt or reject the modification in *Forman*, 421 U.S. at 852, n.16, 95 S.Ct. at 2060, n.16, although the shift in semantics in the fourth phase from *Howey* to *Forman* is the Court's own. *See also Williamson v. Tucker*, 632 F.2d 579, 593-94 (5th Cir. 1980).

Corp., 445 F.Supp. 1263 (S.D.N.Y. 1978); *NBI Mortgage Investment Corp. v. Chemical Bank*, (1976) Fed. Sec.L.Rep. (CCH) Par. 95,632 (S.D.N.Y. 1976) and (1977) Fed.Sec.L.Rep. (CCH) Par. 96,066 (S.D.N.Y. 1977). A majority of the courts, however, have reached the opposite conclusion. *See American Fletcher Mort. Co. v. U. S. Steel*, 635 F.2d 1247, 1253-54 (7th Cir. 1980) *cert. denied*, —— U.S. ——, 101 S.Ct. 1982, 68 L.Ed.2d 300 (1981); *United Bank of Nashville v. Gunter*, 620 F.2d 1108, 1110 (5th Cir. 1980); *Manchester Bank v. Conn. Bank & Trust Co.*, 497 F.Supp. 1304, 1309-13 (D.N.H. 1980); *Provident National Bank v. Frankford Trust Co.*, 468 F.Supp. 448, 452-55 (E.D.P. 1978); *FBS Financial, Inc. v. Clevetrust Realty Investors*, (1978) Fed.Sec.L.Rep. (CCH) Par. 96,341 (N.D. Ohio 1977). We agree with the wisdom of this position, and for the reasons that follow conclude that the loan participation purchased by the Bank does not constitute a security.

PRESENCE OF AN INVESTMENT

In passing on the first phase of the *Howey-Forman* test, several courts have recognized the dilemma inherent in distinguishing between investment and commercial transactions:

> In one sense, every lender of money is an investor since he places his money at risk in anticipation of profit in the form of interest. Also, in a broad sense every investor lends his money to a borrower who uses it for a price and is expected to return it one day.

FBS Financial, supra, at 93,156 *quoting C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc.*, 508 F.2d 1354, 1359 (7th Cir.), *cert. denied*, 423 U.S. 825, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975).

To assist in isolating the investment transactions which the Securities Acts were intended to cover, the courts have developed several modes of analysis, the most popular of which is the "risk capital" test enunciated in *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1257 (9th Cir. 1976).[10] *See also United Cal. Bank v. THC Financial Corp.*, 557 F.2d 1351, 1358 (9th Cir. 1977). The "risk capital" test focuses on six criteria: 1) time; 2) collateral; 3) form of the obligation; 4) circumstances of issuance; 5) relationship between amount borrowed and size of borrower's business; and 6) intended use of the funds. Since the loan agreement in *Great Western* was carefully tailored to the bank's requirements, placing extensive restrictions on the use of the loan proceeds and the conduct of the financial operation, the court held that the loan was not "risk capital" but was simply a commercial loan subject to the hazards normally incident to such transactions. A concurring opinion focused on the absence of any indication in the legislative history of the securities laws that Congress intended to include commercial financing within their protection. Noting that commercial bank lending is un-

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[10] For a critique of the shortcomings of this test, see Note, *Bank Loan Participations as Securities: Notes, Investment Contracts, and the Commercial/Investment Dictionary*, 15 Duquesne L.Rev. 261, 286-91 (1976-77). Although, the Second Circuit criticized this test in *Exchange National Bank, supra*, it is evident that arguing from the phrase "unless the context otherwise requires" invites consideration of many of the same factors present in the "risk capital" analysis. *See Exchange National Bank*, 544 F.2d at 1138-39. Were we not constrained by the *Forman* framework, we might be tempted to examine a fresh approach to the subject. *See e.g.* FitzGibbon, *What is a Security?—A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 Minn.L.Rev. 893 (1980) (proposing as the definition of security "a financial instrument eligible to participate in a public market" based upon the history of the securities legislation and mechanics of the markets). *Id.* at 919.

related to the abuses associated with investing that Congress intended to eliminate through the Exchange Act, the concurrence concluded that the federal securities statutes were inapposite to notes received by a bank in an exercise of its lending function. 532 F.2d at 1260-1262. *See also Movielab, Inc. v. Berkey Photo, Inc.*, 321 F.Supp. 806, 808-09 (S.D.N.Y. 1970), aff'd, 452 F.2d 662 (2d Cir. 1971).

Measuring the transaction in the present case against the risk capital criteria, we conclude that the participation agreement does not evidence an "investment" within the meaning of *Howey-Forman*. Indeed, the Bank's own nomenclature reveals that it did not consider its participation as an investment. On that score, the name assigned to the transaction by the parties, although not dispositive, is relevant in determining security status. *Forman*, 421 U.S. at 850, 95 S.Ct. at 2059. Throughout the transaction it is clear that the Bank regarded its participation as a loan, rather than an investment. The document which Irvine submitted to the Bank's Executive Committee reporting the Participation Agreement was entitled "Line of Credit Approved or Disapproved." Sundry other Bank memos confirm this characterization, referring to the "lending" involved and the Bank's prior lending to Donalds as "direct," implying that the loan participation was merely an "indirect" loan of the same nature. There is no indication in the record that the Bank distinguishes between participatory and direct loans, and the Bank's participation with CCBL in the extension of credit to Donalds was apparently approved by the same officials who normally pass on direct loans. William Acker, the Bank's expert concerning industry standards in connection with loan participations, referred many times in his testimony to CCBL as the "primary lender" in the loan. These factors confirm the parties perception of the participation as nothing more than a routine commercial loan.

The *Great Western* test first examines the time frame in which the funds are retained by the borrower; the longer the money is held, the more probable it becomes that an investment is involved. *Great Western, supra*, at 1257-58. Here, the Secured Term Loan Agreement provided that Donalds would commence repayment of the loan amounts almost immediately, and would have the entire balance paid off by November 30, 1978. More importantly, the full amount of any advances were collaterized by Donalds' accounts receivable. The loan apparently had sufficient collateral when executed, and the Bank never sought to investigate or appraise the adequacy of the accounts receivable. The existence of collateral is strongly suggestive of a commercial loan. *See FBS, supra* at 93,156.

The additional factors also counsel against finding an "investment." There was no public offering and there is no indication that the participation interest was "procured for speculation or investment." *See McClure v. First National Bank*, 497 F.2d 490, 493 (5th Cir. 1974), *cert. denied*, 420 U.S. 930, 95 S.Ct. 1132, 43 L.Ed.2d 402 (1975); *Lino v. City Investing Co.*, 487 F.2d 689, 694-95 (3rd Cir. 1973). The Bank was well aware that the loan proceeds were to be used to finance Donalds' current operations instead of serving as risk capital to obtain new productive assets. Although the Bank insists that because of CCBL's control over the loan, it (the Bank) was no more than a passive investor, we feel that the *Great Western* factors militate against finding an investment here.

COMMON VENTURE

The second prong of the *Howey-Forman* test looks for the existence of a "common venture." While the trial judge characterized the loan syndication as a "joint venture," the Bank urges that the facts here support a finding of a common venture, without offering any insight

as to the distinction between the two terms. In considering whether a given relationship between parties to a transaction satisfies the common venture element for a security, the courts have identified two types of alliances: vertical and horizontal. *See* Note, *Liabilities of Lead Banks in Syndicated Loans under the Securities Acts*, 58 B.U.L. Rev. 45, 56-58 (1978). A common enterprise involving vertical commonality is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and successes of those seeking the investment of third parties. *See SEC v. Continental Commodities Corp.*, 497 F.2d 516, 521-22 (5th Cir. 1974); *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 n.7 (9th Cir. 1973). It requires only that the investor and promoter be involved in some common venture without requiring the involvement of other investors. *Brodt v. Bache & Co., Inc.*, 595 F.2d 459, 461 (9th Cir. 1980). A vertical relationship is best illustrated by a one-on-one arrangement between a lender and a customer. A horizontal common enterprise, on the other hand, requires a heightened degree of affiliation. Horizontal commonality ties the fortunes of each investor in a pool of investors to the success of the overall venture. *See Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274, 278 (7th Cir.) *cert. denied*, 409 U.S. 887, 93 S.Ct. 113, 34 L.Ed.2d 144 (1972).[11] In fact, a finding of horizontal commonality requires a sharing or pooling of funds. *See Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 101 (7th Cir. 1977).

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[11] In *Milnarik*, unrelated discretionary commodities accounts were all managed by the same commodities broker. Since the accounts were not connected and were not managed similarly, the success or failure of one account had no effect on the status of the other accounts. Each investor received profits from the sale of commodities in his own account, rather than a share of the aggregate profits that the diverse accounts generated collectively. 457 F.2d at 276-77.

This circuit selected its approach in *Curran v. Merrill Lynch, Pierce, Fenner and Smith*, 622 F.2d 216 (6th Cir. 1980), *cert. granted*, —— U.S. ——, 101 S.Ct. 1971, 68 L.Ed.2d 293 (1981). In deciding that a discretionary trading account was not a security, Judge Engel noted that a requirement of horizontal commonality best comported with the language of *Howey*, because in a common enterprise all investors must share a common fortune. *Id.* at 222. The relationship in *Curran* was entered into solely between the plaintiff as an investor and Merrill Lynch as broker. To find a common enterprise in that relationship—where a principal has entrusted funds to an agent—the court noted, would effectively excise that requirement from the *Howey-Forman* test.

Under the facts of the present case we have little difficulty recognizing a common enterprise. The fortunes of the Bank and CCBL as lenders in this transaction were inextricably intertwined. The loan shares of the Bank and CCBL were not unitary in nature; the success or failure of each was not without regard to the other. The profits or losses flowed uniformly to each. As a result, when Donalds entered bankruptcy, the proceeds from collection of the accounts receivable were channelled pro rata, on a 50-50 basis, to the Bank and CCBL. On the whole, then, the Bank and CCBL were engaged in a common venture to loan money to Donalds.

REASONABLE EXPECTATION OF PROFITS

The Participation Agreement provided that the Bank would be repaid the amounts of principal advanced plus a fixed rate of interest. The Bank argues that "the fact that the profits of the Bank reasonably expected to receive from its investment were interest earnings does not in any way diminish the investment nature of the contract." To support this contention, the Bank cites

MacKethan v. Peat, Marwick, Mitchell & Co., 1978 Fed. Sec.L.Rep. (CCH) Par. 96,342 (E.D.Va. 1977), for the proposition that the Securities Acts encompass debt as well as equity instruments. While it is true that the Securities Acts may regulate certain debt instruments which offer fixed rates of return, *see El Khadem v. Equity Sec. Corp.*, 494 F.2d 1224, 1229 (9th Cir.), *cert. denied*, 419 U.S. 900, 95 S.Ct. 183, 42 L.Ed.2d 146 (1974), that generalized observation does not establish that the interest earnings realized by the Bank constitute "profits" within the meaning of the *Howey-Forman* test. A review of the Supreme Court's treatment of the expression "profits" convinces us they do not.[12]

In *Tcherepnin v. Knight*, *supra*, the Court held that nonnegotiable, withdrawable capital shares in a savings and loan association were securities within the meaning of section 3(a)(10) of the 1934 Act. The Court applied the *Howey* test, found its requirements satisfied and concluded that the shares had the "essential attributes of investment contracts" as that term was used in the Act and defined in *Howey*. A key "essential attribute" was the possibility of appreciation in the value of the investment. The holders of the withdrawable shares were not entitled to a fixed rate of return. Rather, they received dividends declared by the association's board and based on the association's profits. Prospective "profits" in the form of dividends were uncertain; they were a function of the profits of the association, which were in turn tied to the managerial skills of the business.

The focus on an expectation of appreciation in the value of an investment, or a variable rate of return,

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[12] While profits in the form of a fixed rate of return are no less profits as envisioned by the literal understanding of the term, we agree with Judge Learned Hand that "it is one of surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary. . . ." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd* 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945).

was reinforced by *Forman*. The plaintiffs in *Forman* sought the protection of the federal securities laws with respect to nontransferable, nonpledgeable "stock" in a nonprofit enterprise that they had purchased for the purpose of ensuring their right to rent certain low-cost apartments. The Court rejected the contention that the shares were "stock" as that term is used in the Acts, since the interests did not include either the most common feature of stock: the right to receive dividends contingent upon an apportionment of profits, or other attributes such as voting rights and negotiability, 421 U.S. at 851, 95 S.Ct. at 2060. The Court then considered whether the interests were investment contracts, analyzing carefully the "profits" element of the *Howey* test. The Court held that this element of the test was not satisfied and consequently the interests involved were not investment contracts. The key characteristic lacking was the possibility of appreciation; the shares could not appreciate in value since they were subject to a buy back agreement whereby the housing cooperative could repurchase the shares at the tenant's original cost. The Court expanded on its concept of "profits":

> By profits, the Court has meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of investors' funds . . . . In such cases the investor is "attracted solely by the prospect of a return" on his investment. *Howey*, *supra*, 328 U.S. at 300, 66 S.Ct. at 1103. By contract, when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply. 421 U.S. at 852-53, 95 S.Ct. at 2060-61.

In the present case it is undisputed that the Bank had no expectation of capital appreciation; on the contrary, the return expected by the Bank was simply the repay-

ment of the amounts advanced plus a fixed rate of interest. The rate of return the Bank could expect was fixed in the Participation Agreement at the prevailing prime rate plus two points. These interest payments were not contingent. Indeed, CCBL held back 15% of the loan amounts to insure payment. The adequacy of the interest fund was never disputed by the Bank during the life of the loan and the Bank received the full interest to which it was entitled prior to Donald's collapse. Under the terms of the Participation Agreement, no higher rate of return was possible. The profit which would accrue to the Bank in the form of interest earnings was contingent only upon the passage of time, and was not of a different nature than in a commercial lending transaction. Accordingly, the Bank had no reasonable expectation of profit as that term is used in the *Howey-Forman* securities context.

PROFITS DERIVED FROM THE EFFORTS OF OTHERS

The final element of the *Howey-Forman* test requires that the profits be derived from the "managerial or entrepreneurial efforts of others." In its brief the Bank argues that its "receipt of interest income was dependent entirely upon the success of CCBL's efforts to successfully manage Donald's financing and keep them in business." We reject the Bank's argument that the final phase of the test refers to the efforts of CCBL, the lead lender. Although CCBL was clearly responsible for performing certain administrative tasks, those services are not managerial or entrepreneurial within the meaning of the *Howey-Forman* test. The interest income which was to be paid to the Bank and CCBL was to be derived from the efforts of Donalds in retailing furniture. These efforts, in the long run, were unsuccessful and eventually resulted in bankruptcy, but they were not the efforts of

CCBL and therefore the legal test of *Howey-Forman* has not been satisfied.

This result is consistent with the conclusion reached by the majority of federal courts which have considered the issue. For example, in *FBS Financial, supra*, where the court held that a loan subparticipation was not a security, the lead lender had sole responsibility for servicing and administering the loan on behalf of five loan participants. The court noted that centering this responsibility in one lender was indigenous to a loan participation, since efficient administration would be impossible if management were decentralized among all the participants. The necessary concentration of management services in the lead lender, however, did not render those services "entrepreneurial" as required by *Howey* and *Forman*. Addmittedly, the lead lender was responsible for monitoring to completion the construction of an office building which would produce the interest income, but that interest income was not "derived from" the efforts of the lead lender whose managerial efforts were certainly not entrepreneurial. This analysis applies with equal force here. The responsibilities undertaken by CCBL were routine, loan monitoring tasks. Although CCBL supervised the loan, policed the collateral, and collected interest and principal payments, its efforts were not managerial or entrepreneurial in the sense that they generated the return expected by the parties.

In sum, the Bank's attempt to classify the loan participation as a security under the facts present here must fail. The securities laws are not a panacea for commercial loans gone awry. Relief from the consequences of commercial transactions unwisely contracted must be found in another haven. *See Amfac Mortgage Corp. v. Arizona Mall of Tempe*, 583 F.2d 426, 428 (9th Cir. 1978). The decision of the district court that the loan participation interest purchased by the Bank does not constitute a security is affirmed.

IV.

In addition to the federal securities claim, the Bank sought to recover for misrepresentations by CCBL which induced the execution of the amendment to the Participation Agreement under the Tennessee common law of fraud.[13] In the second Special Verdict, the jury found CCBL guilty of commercial fraud under Tennessee law based upon a negligent misrepresentation concerning the credit-worthiness of Donald's accounts receivable in connection with the execution of the amendment to the Participation Agreement. The third Special Verdict answer, however, found the Bank guilty of contributory fault which proximately caused its injury.[14] Under Tennessee law, contributory negligence is a defense to claims of fraud upon negligent misrepresentation. Accordingly, the trial judge entered judgment for CCBL on this issue.

In a post-trial motion to alter or amend the judgment on Tennessee common law fraud, the Bank argued that because a finding of intentional fraud was inherent in the jury's answer to Special Verdict No. 1, the contributory fault verdict was precluded even though Tennessee law differed from federal law by recognizing negligent fraud. The district judge denied that motion.

With a subtle but significant shift in analysis, the Bank now argues that the "trial court's refusal to enter judgment for the Bank on common law fraud was premised upon a refusal to acknowledge that Tennessee law recognizes two separate and different causes of action for fraud." The Bank asserts that the two types

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[13] The jurisdictional basis for these claims was diversity of citizenship, not pendent jurisdiction. *See Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1022 n.9 (6th Cir. 1979).

[14] In ruling on the post-trial motions, Judge McRae reinforced this finding, characterizing the Bank's handling of the loan participation as "gross ineptness".

of fraud which must be distinguished are intentional fraud and negligent fraud. The latter is based on negligent misrepresentation,[15] while the former is predicated upon knowing or reckless conduct, comparable to a federal securities law fraud claim pursuant to section 10(b) and Rule 10b-5.[16]

CCBL does not contest the existence of a Tennessee action for intentional fraud, but rather argues that the Bank never presented this claim at trial, never requested any jury instructions on this theory, and cannot through some sleight of hand interpolate the jury's findings on the federal count to a state count raised for the first time on appeal.

In its brief the Bank concedes that the jury's finding of contributory negligence bars recovery on the theory of negligent fraud, but argues that the jury's finding that CCBL knowingly or recklessly violated the federal securities acts requires recovery on intentional fraud as well. Thus, the Bank seeks to attach a collateral estoppel effect to the jury's finding of knowing or reckless conduct by CCBL in connection with the federal fraud claim; it seeks to use the factual findings of Special Verdict No. 1 to support a judgment for itself on common law intentional fraud. This is required, the Bank argues, because the elements of Tennessee intentional fraud are inherent in the federal sec. 10(b)/10b-5 claim,[17] allowing

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[15] *See Guilbert v. Phillips Petroleum Co.*, 503 F.2d 587, 591 (6th Cir. 1974).

[16] *See Graham v. First American National Bank*, 594 S.W.2d 723, 725 (Tenn.App. 1979).

[17] In *Mansbach, supra*, we observed that "[t]he Sec. 10b/10b-5 claim is not identical to common law fraud, *see James v. Gerber Products Co.*, 483 F.2d 944, 946 (6th Cir. 1973) . . ." 598 F.2d at 1024. There are substantial similarities, however, between certain elements of the two actions. In *Mansbach* we delineated the elements of a federal securities fraud claim as 1) the use of jurisdictional

factual findings to be transposed from the federal count to the state count, so that the court can determine the appropriate judgment to be entered on the special verdict's answer.[18] To support its position, the Bank cites *Solomon v. United States*, 276 F.2d 669, 676 (6th Cir.), *cert. denied*, 364 U.S. 890, 81 S.Ct. 219, 5 L.Ed.2d 186 (1960). There the jury returned separate verdicts against four defendants in a conspiracy case. The defendants argued that separate verdicts were inconsistent with the law of conspiracy where liability is joint and several. This court rejected that contention, noting that under FRCP 49(a) the trial judge is authorized to submit special findings of fact to the jury which might be made under the pleadings and evidence. The jury's findings, in the form of special verdicts, the court went on, are merely factual findings to which the judge must then apply appropriate legal principles.[19] Therefore, the judge could enter verdicts for joint and several liability since the jury had found the facts necessary to convict each defendant.

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means 2) to implement a deceptive or manipulative practice (with the requisite scienter) 3) in connection with 4) the purchase or sale 5) of a security 6) causing 7) damages. 598 F.2d at 1026.

In *Edwards v. Travelers Insurance of Hartford, Conn.*, 563 F.2d 105 (6th Cir. 1977), we capsulized the elements necessary to sustain an action for intentional fraud under Tennessee law: 1) a false representation 2) of an existing or past material fact 3) made knowingly or without belief in its truth or recklessly (with scienter) 4) which induces reasonable reliance 5) resulting in damages. 563 F.2d at 110-113.

[18] This position assumes, of course, that the district judge abused his discretion in ordering a new trial. In light of our conclusion that the Bank is prohibited from raising the claim of intentional fraud on appeal, we need not review the conditional grant of a new trial.

[19] To be sure, special verdicts are concerned only with issues of fact, not issues of law. *See e.g. Dual Mfg. & Eng. v. Burris Industries*, 619 F.2d 660, 667 & n.6 (7th Cir.) (en banc), *cert. denied*, —— U.S. ——, 101 S.Ct. 208, 66 L.Ed.2d 90 (1980).

With the wisdom of *Solomon*, the judge must apply appropriate legal principles to the factual findings returned by the jury, here reflected in the answers to the Special Verdicts. The district judge did just that in granting JNOV on the federal securities claim. Although the jury had returned the requisite factual findings to support a verdict for the Bank, only the trial judge could rule on the threshold legal issue, namely, the existence of a security. His ruling that the loan participation was not a security thereby eclipsed the jury's answer to Special Verdict No. 1, requiring a judgment for the defendant.

Our review of the record convinces us that the trial judge did not enter judgment for the Bank on intentional fraud under Tennessee law because the Bank never asserted a claim based on this cause of action. Conspicuously absent from the Bank's complaint is any reference to intentional fraud under Tennessee law. Indeed, the only reference to any common law claim is the cryptic notation in the complaint that "The Court has jurisdiction of all other claims made herein pursuant to the principal of pendent jurisdiction and . . . the parties are of diverse citizenship." Regarding the defendant's misrepresentations and omissions, the only allegation is that such conduct constituted a Sec. 10b/10b-5 violation. All other assertions in the complaint concern CCBL's alleged negligence in the administration of the loan leading to the amendment of the participation agreement. Even a liberal reading of the complaint fails to hint at an assertion of a common law intentional fraud claim.

The district court's pre-trial order reflects this perception. That order characterized the Bank's contentions as two-fold: an allegation that CCBL's conduct made out a Sec. 10b/10b-5 violation, and an allegation that CCBL's conduct amounted to fraud under Tennessee common

law, the elements of which were 1) untrue statements or omissions of facts; 2) reliance; 3) materiality. These are the elements of negligent fraud, not intentional fraud. That the district court's perceptions were accurate was confirmed by the Bank's special requests for jury instructions. The only requests regarding common law fraud, Nos. 25 and 26, concerned negligent misrepresentations. Accordingly, the jury did not receive a special verdict regarding intentional fraud.

Several factors convince us that the Bank's failure to raise intentional fraud at trial precludes it from raising that claim now. It is axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal. *Banner v. American Can Co.*, 525 F.2d 104, 111 (6th Cir. 1975); *Schneider v. Electric Auto Lite Co.*, 456 F.2d 366, 375 (6th Cir.). *See also McMillan v. Marine Sulphur Shipping Corp.*, 607 F.2d 1034, 1038 & n.8 (2d Cir. 1979), *cert. denied*, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); *Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979).

This general rule is consistent with the finality accorded the pre-trial order. Pre-trial orders are designed to expedite litigation and eliminate surprise by framing the issues remaining for trial. The Bank does not contend that the pretrial order here was improperly drawn, and we see no problems with it. Even under a liberal construction, that order does not embrace the theory now articulated by the Bank. Under Fed.RuleCiv.Pro. 16, the pre-trial order controls the subsequent course of the proceedings and becomes the governing pattern of the lawsuit. *Management Investors v. United Mine Workers*, 610 F.2d 384, 390 n.17 (6th Cir. 1979). Since the defendant had no meaningful opportunity to argue the issue in the district court, the judge appropriately chose not to rule on the issue of intentional fraud. *See Seymour v. Coughlin Co.*, 609 F.2d 346, 348 (9th Cir. 1979).

Finally, the Bank's failure to seek proper jury instructions based upon Tennessee Law, forecloses it from now raising the claim. When a state-created right is being asserted, the state law must be looked to for the substance of the instruction. *Lones v. Detroit, Toledo and Ironton Railroad Company*, 398 F.2d 914, 920 (6th Cir.), *cert. denied*, 393 U.S. 1063, 89 S.Ct. 714, 21 L.Ed.2d 705 (1968). Had the Bank argued fraudulent misrepresentation under Tennessee law at trial, CCBL would have been entitled to certain jury instructions based upon Tennessee law.

CCBL argues that the waiver provision of Fed.R.Civ. Pro. 49(a) precludes our consideration of the Bank's claim. Under Rule 49(a), the failure of a party to request the court to submit any issue to the jury which the court might have overlooked is a waiver of that claim by the party. In the present case the Bank did not submit any special verdict questions relevant to the issue of common law intentional fraud. Rather, the instructions proffered by the Bank related solely to negligent fraud.

We find the waiver provision of dubious applicability here. The waiver provision of Rule 49(a) only applies, when, in submitting the issues to the jury, the court "omits any issue of fact raised by the pleadings or by the evidence." *See General Beverage Sales Co. v. East Side Winery*, 568 F.2d 1147, 1155 (7th Cir. 1978). Since the issue of common law intentional fraud was never raised by the pleadings or by the evidence, it could not be omitted from the special verdicts submitted for the jury's consideration.

The decision of the district court is affirmed.

Opposition

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In The

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-798

THE MURRAY INVESTMENT COMPANY and MURRAY ADVISORY CORPORATION,
Petitioners,

v.

THE [illegible]E INSURANCE COMPANY OF VIRGINIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent would state the issue as follows:

May the jury's answer to special verdict questions of fact not expressly tied to any specific cause of action be used to support recovery under any cause of action which was sufficiently raised in the trial court?

PARTIES

The Life Insurance Company of Virginia*

The Murray Investment Company

Murray Advisory Corporation

* Continental Financial Services owns 100% of The Life Insurance Company of Virginia. Pursuant to Rev. S.Ct. Rule 28-1, companies which are 100% owned by The Life Insurance Company of Virginia are not listed.

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In The

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No. 81-798

THE MURRAY INVESTMENT COMPANY and MURRAY ADVISORY CORPORATION,
Petitioners,

v.

THE LIFE INSURANCE COMPANY OF VIRGINIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Life Insurance Company of Virginia, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 646 F.2d 224 (5th Cir. 1981).

STATEMENT OF THE CASE

Respondent disagrees with Petitioners' "Statement" because it fails to fully and accurately apprise this Court of the state of the case below. Principally misleading is Petitioners' assertion that only two claims were submitted to the jury by means of a special verdict under Federal Rule of Civil Procedure 49(a) [hereafter "Rule 49(a)"]; *viz:* (1) violation of Texas Business & Commerce Code § 27.01 (1968) (hereafter "§ 27.01") and (2) breach of contract. Petitioners, however, failed to point out three significant factors: (1) that the jury charge was not expressly limited to those specific claims (App. 45-64); (2) that the special verdict questions asked the jury to determine whether the factual elements which constitute common law intentional fraud and tortious breach of contract, as well as a § 27.01 claim and a breach of contract claim had been proved (App. 45-64); and (3) that Respondent sufficiently raised claims in the trial court for recovery under both common law intentional fraud and tortious breach of contract. (App. 1-15, 25, 26; Petitioners' App. 9a). Furthermore, the jury found that the elements of both common law fraud and tortious breach of contract were present (App. 45-64; Petitioners' App. 9a).

The issue presented is important to the parties because the jury found that exemplary damages should be awarded Respondent in the amount of $500,000.00; however, the trial court refused to award judgment on that aspect of the verdict. The Fifth Circuit then reversed that portion of the judgment. After ruling that recovery under §27.01 was unavailable the trial court denied exemplary damages because of an erroneous conclusion that Respondent was left with only a breach

of contract claim. The Fifth Circuit, however, correctly held that Respondent had sufficiently raised, and the jury had found facts sufficient to support, a common law intentional fraud claim and a tortious breach of contract claim (646 F.2d at 229; Petitioners' App. 9a). The clear, unequivocable findings of the factual elements of common law intentional fraud and a tortious breach of contract, both of which were pled and proved, require an award of the exemplary damages found by the jury, even though the trial court may have intended such findings to be limited to specified claims, (646 F.2d at 229; Petitioners' App. 9a).

REASONS FOR DENYING THE WRIT

A. The Decision Below Is Not In Conflict With A Recent Decision Of The Sixth Circuit That The Jury's Answer To A Special Verdict Question Expressly Submitted For A Specific Cause Of Action Could Not Be Used To Support Recovery Under Another Cause Of Action Which Was Not Properly Raised.

Petitioners' argument that the writ of certiorari should be granted is premised on the clearly mistaken ground that the Fifth Circuit's opinion in the present case is in conflict with the decision of the Sixth Circuit in *Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174 (6th Cir. 1981), *cert. pending*, No. 81-735 (hereafter cited as "*Union Planters*"). Petitioners argue that this Court should grant the writ of certiorari in order to insure uniformity of decisions in the federal courts of appeals. A careful study of the *Union Planters* opinion and the Fifth Circuit opinion in the present case, however,

clearly reveals that there is no conflict between the two opinions. Consequently, there is no legitimate basis for granting a writ of certiorari. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387 (1923) (discussed *infra.*).

While there is no conflict between the decision in *Union Planters* and the decision here, there are some notable distinctions. The most significant distinction is found in the pleadings and proof of the parties. The plaintiff in *Union Planters* argued that the trial court should have applied the jury's answer to a special verdict question which was expressly tied to a specific cause of action (federal securities act violation) to another separate cause of action (common law intentional fraud) that had neither been pled, nor sufficiently raised until the appellate brief was presented to the Sixth Circuit.[1] (Petitioners' App. 58a.) The Sixth Circuit clearly stated, as its grounds for refusing to apply the jury's answer to a claim that was first asserted by the plaintiff on appeal, the fact that the claim had not been sufficiently raised in the trial court.

> Our review of the record convinces us that the trial judge did not enter judgment for the Bank on intentional fraud under Tennessee law *because the Bank never asserted a claim based on this cause of action. Conspicuously absent from the Bank's complaint is any reference to intentional fraud under Tennessee law.* . . . Regarding the defendant's misrepresentations and omissions, the

[1] There is also a clear distinction in the character of the actual special verdict questions in the two cases that nullifies any apparent difference in the results. In *Union Planters* the questions submitted asked whether a legal claim had been proved (Petitioner's App. 29a, n. 5); whereas in the present case the questions submitted asked whether certain facts had been proved (App. 45-64).

> only allegation is that such conduct constituted a Sec. 10b/10b-5 violation. All other assertions in the complaint concern CCBL's alleged negligence in the administration of the loan leading to the amendment of the participation agreement. *Even a liberal reading of the complaint fails to hint at an assertion of a common law intentional fraud claim.* 651 F.2d at 1187; Petitioners' App. 53a (emphasis supplied).

In the present case, the Fifth Circuit was just as clear in stating as its reason for relying on the jury's special verdict answers to support the award of exemplary damages found by the jury the fact that Respondent sufficiently raised claims to support such an award.

> [A]n examination of the record clearly indicates that, while LOV's [Respondent's] original or subsequent complaints do not specifically set forth a claim for relief entitled "Common Law Fraud," *the Complaints clearly plead facts which, if proven, would constitute common law fraud* and such facts were incorporated by reference within LOV's Breach of Contract claim for relief . . . *We find that LOV's pleadings were sufficient to raise the fraud as a basis for its breach of contract cause of action.* 646 F.2d at 229; Petitioners' App. 8a, 9a. (emphasis supplied).

Clearly, the alleged conflict in circuits asserted by Petitioners is, upon close examination, merely different and clearly reconcilable reasonings applied to entirely different factual settings and issues. This Court, through Chief Justice Taft, established the types of cases which justify granting a writ of certiorari as those "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a *real and embarrassing conflict of opinion and authority* between

the Circuit Courts of Appeals." *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), (emphasis supplied); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955).

The opinions of the Fifth and Sixth Circuit at issue here are clearly complementary, rather than conflicting; therefore, the standard established in *Layne & Bowler, supra,* cannot be satisfied. Accordingly, the writ of certiorari should not be granted.

B. The Question Presented Is Not Special Or Important Enough To Warrant Review And Decision By The United States Supreme Court.

The Revised Rules of the Supreme Court of the United States specifically state, in reference to the writ of certiorari, that review by certiorari "will be granted only when there are special and important reasons therefor." Rev. Sup. Ct. R. 17.1 (1981). The facts here simply do not support Petitioners' claim that the question presented is special or important. In the two sentences and three footnotes devoted to this requirement, Petitioners assert (without any supporting authority) that the "frequency with which the question may be encountered is manifold." (Petition For Writ Of Certiorari 6, n.6). Yet, in the 43 years of Rule 49's existence, the question presented here has apparently been raised just once — the present case.

Petitioners also attempt to lend credence to their claim of importance by stating that this Court has not yet ruled on Rule 49 or its use. (Petition For Writ Of Certiorari 6). The failure of this court to have previously

discussed a rule of civil procedure, however, is not a sufficient basis for granting a writ of certiorari. Rev. Sup. Ct. R. 17.1; *cf. Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387 (1923) (public importance is a condition to granting a writ of certiorari).

Finally, Petitioners cited several commentaries apparently in an effort to create the impression that there is a conflict of opinion among scholars regarding the value of Rule 49. (Petition For Writ of Certiorari 6, n.7, 8). Yet, it is clear that " '[s]pecial and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). The "academic" nature of Petitioners' question is principally made evident by the lack of actual conflict between the Sixth Circuit's *Union Planters* decision and the Fifth Circuit's decision here. The lack of a real controversy is also clear from Petitioners' lack of primary authority and their resort to citation to commentaries to attempt to bolster the significance of their point. The Supreme Court, however, "does not sit to satisfy a scholarly interest" in issues which may be presented to it. *Id.* Merely to provide an answer to a topic discussed in legal publications certainly is not a "special and important reason" for granting a writ of certiorari.

Because it is clear that Petitioners' assertion of a conflict between decisions of the Courts of Appeals is without merit, Petitioners' question becomes even more academic. The question posed by Petitioners is basically the following: Whether, when a jury finds facts sufficient to support a cause of action which was pled

and proved, those findings may be used to support a judgment, or must they be ignored merely because the trial court had a different ground of recovery in mind when the particular issue was submitted. In other words, the argument becomes one of whether form is to be elevated over substance and practicality.

Finally, the existing law on the question presented is not in conflict and strongly supports the Fifth Circuit's decision. If two or more grounds of recovery consist of the same or similar factual elements, it is clear that a separate and complete set of special verdict questions do not have to be submitted for each such ground. *Perzinski v. Chevron Chemical Company*, 503 F.2d 654, 660 (7th Cir. 1974); *Angelina Casualty Company v. Bluitt*, 235 F.2d 764, 770 (5th Cir. 1956); *Maryland Casualty Company v. Broadway*, 110 F.2d 357, 360 (5th Cir. 1940). This question has been resolved in a clear and consistent manner by the decisions of the several courts cited, all of which have held that a court is not required to submit additional issues where the point is adequately covered by other questions or instructions. *Id.*

A trial court is not limited in its application of a jury's factual findings pursuant to Rule 49(a); however, the trial court must apply the law to the factual findings. *Solomon v United States*, 276 F.2d 669, 676 (6th Cir. 1960); *cert. denied*, 364 U.S. 890 (1960), *rehearing denied*, 364 U.S. 939 (1961); *Thedorf v. Lipsey*, 237 F.2d 190 (7th Cir. 1956). Yet, in doing so, the court is not limited by the separate nature of the special verdict issues *Id.* Moreover, the court cannot withdraw from the jury valid theories of recovery upon which a plaintiff has produced

sufficient evidence. *Ajax Hardware Manufacturing Corp. v. Industrial Plants Corporation*, 569 F.2d 181, 187 (2d Cir. 1977); *Kornicki v. Calmar Steamship Corporation*, 460 F.2d 1134, 1139 (3rd Cir. 1972); *National Bank of Commerce v. Royal Exchange Assurance of America, Inc.*, 455 F.2d 892, 898 (6th Cir. 1972).

In summary, there is no important or special reason to review the Fifth Circuit's opinion in this case. Petitioners' argument to the contrary is merely academic. This is particularly true in the present case, because Petitioners' assertions (*i.e.* that a jury's factual findings must be specifically referable to a particular cause of action and that the trial judge is similarly limited in his application of the law to the factual findings) have been consistently decided contrary to Petitioners' position. Since there is no issue "the settlement of which is of importance to the public as distinguished from that of the parties," *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), review by the Supreme Court is simply not warranted.

CONCLUSION

Petitioners have wholly failed to show that there is any conflict between opinions of the Fifth and Sixth Circuits, or any other circuit, on the question presented. Petitioners have further failed to establish that the question presented is special or important enough to warrant review by the Supreme Court of the United States. Accordingly, the petition for writ of certiorari to the Fifth Circuit Court of Appeals in this case should be denied.

Respectfully submitted,

COKE & COKE

By .....

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
NO. CA 3-76-0521-F

THE LIFE INSURANCE
COMPANY OF VIRGINIA,
Plaintiff,

vs.

THE MURRAY INVESTMENT COMPANY
and MURRAY ADVISORY CORPORATION,
Defendants

THIRD AMENDED COMPLAINT OF THE LIFE INSURANCE COMPANY OF VIRGINA

The Life Insurance Company of Virginia ("Plaintiff" or "Life of Virginia") files its Second Amended Complaint against the above named Defendants and, demanding trial by jury, complains and alleges as follows:

CLAIMS FOR RELIEF UNDER THE LAWS OF THE STATE OF TEXAS

I.
Jurisdiction and Venue

1. This Court has jurisdiction based upon 28 U.S.C. §1332 because (i) there is diversity of citizenship between the Plaintiff and each of the Defendants; (ii) the amount in controversy exceeds $10,000.00 exclusive of costs; and (iii) the doctrine of pendent jurisdiction applies.

2. Venue in this Court arises from 28 U.S.C. §1391, because of the claims set forth herein arose in the

Northern District of Texas. Further, all Defendants reside in the Northern District of Texas.

II.

The Parties

3. Plaintiff is an insurance company incorporated and existing under the laws of the State of Virginia and has its principal office and place of business at 6610 West Broad Street, Richmond, Virginia 23230.

4. Defendant Murray Investment Company ("Murray Investment") is a Texas corporation with its principal office and place of business at 1818 North Akard Street, Dallas, Texas 75201, where it may be served with process by serving its registered agent, W. O. Murray.

5. Defendant Murray Advisory Corporation ("Murray Advisory") is a Texas corporation with its principal office at 1818 North Akard Street, Dallas, Texas 75201, where it may be served with process by serving its registered agent, Jack E. Crozier. Murray Advisory was originally incorporated under the name Murray Management Corporation, and did business under that name until that name was duly changed to Murray Advisory pursuant to the filing, on June 9, 1975, of Articles of Amendment to its Articles of Incorporation with the Secretary of State of the State of Texas.

6. Previously named as defendants herein were: Gar-Dal, Inc., O. K. Jones, individually and d/b/a O. K. Jones Construction Company ("Jones"), R. L. McSpedden ("McSpedden"), Charles C. Shaver ("Shaver"), Paul Hamby ("Hamby"), and Ted Hunt, Jr. ("Hunt") who are still referred to as Defendants herein because of the Court's requirements and Order of March 23, 1979, re the

filing of Plaintiff's Second Amended Complaint. By its Second Amended Complaint, however, Plaintiff dismissed its claims herein against each such entity and individual.

III.

Course of Dealings

7. On or about April 18, 1973, Life of Virginia and Murray Investment executed a document entitled Correspondent Loan Agreement ("Correspondent Agreement") renewing and confirming a relationship of trust and confidence of many years standing between Life of Virginia and Home Mortgage Investment Co. ("Home Mortgage") which had recently merged with Murray Investment. Under the terms of the Correspondent Agreement, Murray Investment, as correspondent, agreed to present loan applications to Life of Virginia with its recommendations that Life of Virginia issue commitments to purchase any such loans. The Correspondent Agreement provided that Murray Investment was to service, on behalf of Life of Virginia, any loans purchased by Life of Virginia from Murray Investment. A copy of the Correspondent Agreement is attached hereto as Exhibit 1.

8. In April 1973, Home Mortgage forwarded to Life of Virginia a loan application from a joint venture hereinafter called "Gar-Dal Venture" (comprised of the principal shareholders of Gar-Dal, Inc.) which proposed to build a certain two-story office building on real estate situated in Dallas County, Texas, such real estate being more particularly described in Exhibit 2 attached hereto. Upon the merger of Home Mortgage into Murray Invest-

ment, Murray Investment took over the servicing of this loan application. All subsequent negotiations with Life of Virginia concerning such application were conducted under the terms of the Corresponding Agreement.

9. Prior to issuing its Loan Commitment, Life of Virginia received documents supporting the loan application, including financial statements of the principals of Gar-Dal Venture, plans and specifications for the proposed building, and appraisals of the projected value of the property following completion of construction.

10. Pursuant to a commitment letter ("Commitment") dated May 14, 1973, Life of Virginia agreed to purchase the loan subject to certain conditions. A copy of the Commitment is attached as Exhibit 3. In June 1973, Gar-Dal Venture accepted the Commitment and paid a standby fee to Plaintiff. Shortly thereafter, Gar-Dal, Inc., replaced Gar-Dal Venture as borrower by amendment to the Commitment. Murray Mortgage Investors, a Massachusetts business trust controlled by Murray Investment, or, alternatively, controlled by those persons or entities who also control Murray Investment, then executed a loan agreement with Gar-Dal, Inc., an unexecuted copy of which is attached hereto as Exhibit 4, whereby Murray Mortgage Investors agreed to provide interim financing to Gar-Dal, Inc. Defendant Murray Advisory is the corporation which conducts the day to day business of Murray Mortgage Investors and is the agent for Murray Mortgage Investors in many matters including the servicing of this loan to Gar-Dal, Inc.

11. The contract for the construction of the proposed two-story building was awarded to Jones. Jones was then and is now President of Gar-Dal, Inc.

12. Gar-Dal, Inc. executed and delivered to Murray Mortgage Investors a promissory note ("Note") dated August 17, 1973, in the principal sum of $1,050,000.00. A copy of the Note is attached hereto as Exhibit 5.

13. The Note was partially guaranteed, jointly and severally, by the shareholders of Gar-Dal, Inc., *i.e.*, Jones, McSpedden, Shaver, Hamby, and Hunt.

14. The indebtedness evidenced by the Note was secured by liens and security interests created by a deed of trust, mortgage and security agreement ("Deed of Trust"), dated August 17, 1973, and recorded at Volume 73163, Page 9821 of the Deed of Trust Records of Dallas County, Texas ("Deed of Trust Records"). A copy of the Deed of Trust is attached hereto as Exhibit 6. Pursuant to an "Assignment of Leases," herein so called, dated August 17, 1973, recorded at Volume 73163, Page 0837 of the Deed Records of Dallas County, Texas ("Deed Records") and attached hereto as Exhibit 7, Gar-Dal, Inc. assigned as additional security to Murray Mortgage Investors two leases, one executed by Jones and the other jointly by Hamby and Shaver, as prospective tenants of the building. Pursuant to an "Assignment of Rents," herein so called, dated August 17, 1973, recorded in Deed Records at Volume 73163, Page 0831 and attached hereto as Exhibit 8, Gar-Dal, Inc. assigned to Murray Mortgage Investors the right to receive rents paid by all prospective tenants of the premises.

15. The instruments referred to in paragraphs 13 and 14 were subsequently modified by an instrument entitled "Modification of Note, Deed of Trust, Mortgage and Security Agreement, Assignment of Leases, and Assign-

ment of Rents," ("Modification Agreement") dated November 15, 1974, recorded at Volume 74232, Page 0226 of the Deed of Trust Records, and attached hereto as Exhibit 9. The modifications were necessary, in large part, to correct certain typographical errors.

16. On the 3rd day of December, 1974, by an instrument entitled "Transfer," herein so called, a copy of which is attached as Exhibit 10, Murray Investment, as the holder of the Note, sold the Note to Plaintiff, assigned the collateral to Plaintiff, and on December 17, 1974, received the sum of $1,050,000.00 from Plaintiff as consideration.

17. Shortly thereafter, Gar-Dal, Inc. failed to make payments when due. Plaintiff gave Gar-Dal, Inc. notice of the delinquency and thereafter accelerated the maturity of the indebtedness evidenced by the Note. A foreclosure sale was duly held on June 3, 1975, as permitted under the terms of the Deed of Trust, and Plaintiff, being the highest bidder, purchased the property and improvements thereon, as described in Exhibit 2, at the foreclosure sale.

18. At the time the Note was purchased by Life of Virginia, the building and other improvements constructed upon the property, as described in Exhibit 2, deviated from the plans and specifications, had been built with inferior materials, exhibited inferior workmanship, and, in certain instances incorporated design defects which violate the building codes of the City of Dallas, Texas.

19. Contrary to the representations of Defendant Murray Investment, and the expectations of Plaintiff,

the building was wholly unoccupied at the time of the purchase of the Note by Plaintiff.

20. In addition the certificate of occupancy issued by the City of Dallas was withdrawn upon the City's discovery of false representations made to it by Defendants, or by some of them.

IV.

Fraud and Misrepresentation

21. Plaintiff, in the Commitment, required:

(i) that the proposed building be satisfactorily constructed and completed according to plans and specifications submitted at the time of the application for the permanent loan; (ii) that Murray Investment, the correspondent, certify quarterly that construction was proceeding in accordance with plans and specifications and certify that construction of the building had been completed in accordance with the plans and specifications; and (iii) that Hamby and Shaver, jointly, lease 20,000 square feet of the premises, and that Jones, individually, lease 2,000 square feet, and that such tenants accept and occupy the premises upon completion of the construction.

22. While the building and other improvements were being constructed, officers and agents of Murray Investment and Murray Advisors led Plaintiff to believe that the requirements discussed above were being timely met. Prior to the time Plaintiff purchased the Note, these persons alleged that construction was complete and represented to Plaintiff that all conditions of the Commitment had been met. In reality, the plans and specifications had been deviated from or altered without

Plaintiff's knowledge or consent, and construction, materials and workmanship were substandard and inadequate, and, in many cases, such deficiencies were obvious to the naked eye.

23. Further, certain less expensive equipment and materials of substandard quality were substituted for equipment and materials called for in the plans and specifications. Plaintiff's original estimate of the value of the project had been, in part, based upon the installation or incorporation of equipment and materials of a specified type and quality.

24. Portions of the interior of the building, the landscaping of the grounds, and the preparation and paving of parking areas were not completed in accordance with the plans and specifications. Plaintiff was not informed that these items were incomplete. Rather, Defendants led Plaintiff to believe that, with minor exceptions, these items had been completed in conformity with the plans and specifications.

25. The building was not constructed in compliance with the building codes of the City of Dallas, Defendants having, among other things, misrepresented to the City of Dallas the size of the building. The City of Dallas, thereafter, withdrew its certificate of occupancy, in part, because of a lack of adequate parking areas. Plaintiff was assured by Defendants that construction was completed in compliance with those building codes.

26. Defendants represented to Plaintiff that the project had been or was being pre-leased, in part to Jones, Hamby and Shaver as required in the Commitment, and in part to other tenants. In truth, the leases executed by

Jones and by Hamby and Shaver, jointly, and then assigned to Plaintiff, were worthless to Plaintiff, no space in the building having been occupied, and no other space having been leased to other tenants.

27. When Plaintiff purchased the Note, it relied upon the foregoing representations made by Defendants; the representations were false, were known by Defendants to be false at the time made, and were made with the intent and design of inducing Plaintiff to purchase the Note and accept the Transfer; Plaintiff did not know at the time the representations were made that the same were false, and Plaintiff was deceived thereby; and, Plaintiff, believing such representations to be true, relied thereon and was thereby induced by Defendants to enter into a contract, to-wit, the acceptance of the Transfer, and the purchase of the Note. These misrepresentations and misstatements of material facts were made as part of a knowing and conscious scheme entered into by all of the defendants with intent to defraud Plaintiff.

FIRST CLAIM FOR RELIEF

V.

Incorporation

28. Paragraphs 1 thru 27, inclusive, are again alleged herein, as though set forth in full.

VI.

Rescission

29. Because the purchase of the Note and the acceptance of the Transfer were procured by fraud, Plaintiff requests this Court to rescind the purchase transaction, the Transfer, and all other contracts entered

into between Plaintiff and Murray Investment, Gar-Dal, Inc., and the shareholders of Gar-Dal, Inc. By this pleading, Plaintiff tenders to Murray Investment title to the land and improvements which it acquired by the foreclosure, and moves that the Court order Murray Investment to pay to Plaintiff the full amount paid Murray Investment under the terms of the Transfer, attached hereto as Exhibit 10, plus interest thereon at the rate specified under the terms of the Note from the date of the sale to Plaintiff until paid, together with the damages set forth in the following paragraph.

30. All of the named Defendants are further, jointly and severally, liable to Plaintiff for damages of not less than $725,000.00, which sum represents the amount expended by Plaintiff in direct reliance upon the fraudulent acts and misrepresentations of Defendants. Plaintiff relied upon the acts and misrepresentations of Murray Investment, Murray Advisors and Gar-Dal, Inc. Those acts and misrepresentations were in furtherance of a conspiracy between those Defendants and Gar-Dal, Inc., Jones, Hamby, Shaver, McSpedden and Hunt.

SECOND CLAIM FOR RELIEF

VII.

Incorporation

31. Paragraphs 1 through 27 above, inclusive, are again alleged herein as though set forth in full.

VIII.

Fraud In A Real Estate Transaction, Involving Article 27.01 of the Texas Business & Commercial Code

32. Plaintiff, in the alternative to its first claim for relief and in the alternative to the claims for relief set forth below, alleges that Defendants, in violation of Art. 27.01, *Tex. Bus. & Comm. Code Ann.* (1968), made false representations of material facts for the purpose of inducing Plaintiff to enter into a transaction involving real estate, to-wit, the acceptance of the Transfer and the purchase of the Note, which false representations were relied upon by Plaintiff. In the alternative, Plaintiff alleges that Defendants benefitted, knowingly or unknowingly, from the said false representations.

33. Defendants Murray Investment, Murray Advisory and Gar-Dal, Inc. were makers, of such false representations or, alternatively, benefitted from the false representations set forth in paragraphs 21 through 27 above. Defendants Jones, McSpedden, Shaver, Hamby and Hunt, individually, were makers of said false representations and conspired with other Defendants in making the false representations or, alternatively, knowingly benefitted from the making of those false representations.

34. By reason of these false representations, Plaintiff has suffered actual damages, in the amount of the difference between the value of the loan as represented to Plaintiff at the time the loan was purchased and its actual value at that time, or in the alternative, the difference between the value of the real estate securing the loan as represented to Plaintiff at the time of

purchase (but not to exceed $1,050,000.00) and the actual value of the real estate securing such loan at that time.

35. As a result of their knowing participation in this fraudulent scheme, or their knowing receipt of benefit from the fraudulent scheme, Defendants are liable jointly and severally to Plaintiff for exemplary damages in twice the amount of Plaintiff's actual damages.

THIRD CLAIM FOR RELIEF

IX.

Incorporation

36. Paragraph 1 through 27 above, inclusive, are again alleged herein as though set forth in full.

X.

Breach of Contract

37. Plaintiff, in the alternative to its claims for relief set forth above and below, would show the Court that, by reason of the false representations and omissions set forth in paragraph 21 through 27, all Defendants are liable to Plaintiff for breach of Plaintiff's contract to purchase the loan described in the Commitment.

38. As a result of this breach of contract, Plaintiff has suffered actual damages in the amount of the difference between the value of the loan as represented to Plaintiff at the time the loan was purchased and its actual value at that time.

39. Moreover, Defendants and others conspired together to bring about the breach of the contract and such breach was tortious. Plaintiff is, therefore, entitled to recover exemplary damages in the sum of at least twice the amount of actual damages.

FOURTH CLAIM FOR RELIEF

XI.

Incorporation

40. Paragraphs 1 through 27, inclusive, are again alleged herein as though set forth in full.

XII.

Violation of Article 581-33 of The Securities Act of the State of Texas

41. Plaintiff, in the alternative to its other claims for relief alleges that Defendants have violated article 581-33 of the Texas Securities Act, *Tex. Rev. Civ. Stat. Ann.*, art 581-33 (1957), by offering and selling to Plaintiff a security (a note or evidence of indebtedness, or a form of commercial paper, or a certificate in or under a profit sharing or participation agreement, or an instrument representing or secured by an interest in any or all of the capital, property, assets, or earnings of any company, or an investment contract) (i) by means of untrue statements of material facts and (ii) by their failure to state material facts necessary in order to make the statements actually made not misleading. When Plaintiff purchased the security, Plaintiff did not know of these untruths or omissions which were willfully made by Defendants. Therefore, Defendants were engaged in acts, practices and a course of business which operated as a fraud and deceit upon Plaintiff in connection with Defendants' sale of the security to Plaintiff, in the manner and by the means set forth below, all in violation of Article 581-33 of the Texas Securities Act, *Tex. Rev. Civ. Stat. Ann.*, art. 581-33 (1957).

42. As a result of this sale of a security in violation of

Art. 581-33 of the Texas Securities Act, Plaintiff requests this Court to rescind the purchase transaction, the Transfer, and all other contracts entered into between Plaintiff and Murray Investment, Gar-Dal, Inc., and the shareholders of Gar-Dal, Inc., allowing Plaintiff to recover as damages the consideration in the amount of $1,050,000.00 paid for the security, together with interest thereon as provided in the Note from the date of sale to Plaintiff until paid and the sum of not less than $725,000.00, being the amount expended by Plaintiff in direct reliance upon the misrepresentations of Defendants.

43. As a result of Defendants' willful misrepresentations and omissions as herein alleged, Defendants are liable, jointly and severally, for exemplary damages in twice the amount of Plaintiff's actual damages.

CLAIMS FOR RELIEF UNDER THE LAWS OF THE UNITED STATES

XIII.

Jurisdiction and Venue

44. This Court has jurisdiction pursuant to 28 U.S.C. §1331, for this cause arises under the laws of the United States, namely Section 22(a) of the Securities Act of 1933, as amended [15 U.S.C. §77v(a)] and Section 27 of the Securities Exchange Act of 1934, as amended [15 U.S.C. §78aa], and the amount in controversy exceeds the sum of $10,000.00, exclusive of costs.

45. The Defendants are subject to service of process herein under Section 22(a) of the Securities Act of 1933, as amended [15 U.S.C. §77v(a)], the Section 27 of the

Securities Exchange Act of 1934, as amended [15 U.S.C. §78aa].

46. Plaintiff brings this action pursuant to Section 10(b) of the 1934 Securities Exchange Act, as amended [15 U.S.C. §78j(b)], and Rule 10b-5 thereunder [17 C.F.R. 240.10b-5] promulgated by the Securities and Exchange Commission under the authority of Section 10(b) of the 1934 Act, and pursuant to Section 17(a) of the Securities Act of 1933, as amended [15 U.S.C. §77q(a)].

47. The acts and transactions constituting the violations alleged herein have occurred within the jurisdiction of the United States District Court for the Northern District of Texas and elsewhere.

FIFTH CLAIM FOR RELIEF

XIV.

Incorporation

48. Paragraphs 1 through 27 and 44 through 47, inclusive, are again alleged herein, as though set forth in full.

XV.

Violation of Section 10(b) of The Securities Exchange Act of 1934 And Rule 10b-5 Thereunder

49. In the alternative to those claims for relief set forth above, Plaintiff would show that, beginning on or about April 19, 1973, Defendants offered for sale and sold to Plaintiff a security (an investment note, or an evidence of indebtedness, or an investment contract, or a certificate of interest or participation in any of the foregoing). In the offer for sale of this security to Plaintiff, Defendants directly or indirectly used means and instruments of

transaction and communication in interstate commerce and the United States Mail. Defendants, directly and indirectly employing a device, scheme or artifice to defraud, obtained money and property from Plaintiff by means of untrue statements of material facts and omissions of statements of certain material facts which, considered in the light of the circumstances under which such omissions occurred, made other statements of Defendants misleading. These misrepresentations and omissions show that Defendants have engaged in acts, practices, and a course of business which operated as a fraud and deceit upon Plaintiff in connection with Plaintiff's purchase of the security, in the manner and by the means set forth below, all in violation of Section 10(b) of the Securities Exchange Act of 1934, as amended [15 U.S.C. 78j(b)], and Rule 10b-5 thereunder [17 C.F.R. 240.10b-5].

XVI.

Misrepresentations and Omissions

50. Defendants used means and instruments of transaction in interstate commerce and the United States Mail in connection with the sale and purchase of this security.

51. Either by a conspiracy or by knowing participation or by directly or indirectly aiding and abetting, Defendants carried out a device, scheme or artifice in order to defraud Plaintiff, as shown below, by regularly and continually making untrue statements of material facts and by omitting to state certain facts which, considered in the light of the circumstances under which omissions occurred, made other statements of Defendants misleading. Gar-Dal, Inc. aided and abetted

Murray Investment and Murray Advisory in the making of those misstatements or the omitting of statements of certain facts which, considered in the light of the circumstances under which omissions occurred, made other statements of Defendants misleading. Further, Jones, both individually and d/b/a/ O. K. Jones Construction Company, McSpedden, Shaver, Hamby and Hunt conspired together to make possible or knowingly participated in the actions of Gar-Dal, Inc. The device, scheme or artifice used was the result of a conscious and direct attempt to defraud Plaintiff on the part of all the Defendants, or, alternatively, was a joint and concerted course of action by one Defendant and others which was made possible by the silence and failure to act of the other Defendant and others.

52. In connection with such device, scheme and artifice to defraud, the Defendants, singly and in concert, aiding and abetting each other, in connection with the offer and sale of the security, made untrue statements of material facts, including, but not limited to, the following:

(a) That Murray Investment had expertise in all aspects of real estate investment and acquisition in Texas;

(b) That Murray Investment had extensive experience in all phases of development, construction, and financing of real estate in the Dallas area;

(c) That Murray Investment selected loan applications for submission to Life of Virginia only after careful analysis;

(d) That such analysis was made by highly

qualified professionals in the field of real estate acquisition and planning;

(e) That the building was constructed and completed according to the plans and specifications provided to Plaintiff and in accordance with a superior standard of material and workmanship;

(f) That the building was constructed in accordance with all applicable building codes; and

(g) That one half of the leasable space in the building had already been favorably leased and that Defendants would continue to expend their best efforts to lease the remaining space in the building.

53. In connection with the device, scheme or artifice to defraud set forth in paragraph 49 above, the Defendants and others, singly and in concert, aiding and abetting each other, in connection with the offer and sale of the security, omitted to state facts necessary to make the statements made not misleading, in the light of the circumstances under which such omissions occurred, including but not limited to the following:

(a) That Murray Investment had extremely limited knowledge of the quality of the materials and workmanship used in constructing the building;

(b) That Gar-Dal, Inc. had in fact not leased one half of the leasable space in the building and was not seeking to lease additional space and that those leases assigned to Plaintiff were valueless;

(c) That Defendants failed to carefully inspect construction of the building;

(d) That Gar-Dal, Inc. had deliberately modified

the plans and specifications;

(e) That the tract of land was purchased and the building constructed without adequate inquiry into all the material facts concerning such property and construction;

(f) That workmanship and materials were substandard and inadequate;

(g) That substitutions of equipment and materials occurred, with less expensive equipment and materials of substandard quality being substituted for the equipment and materials called for in the plans and specifications approved by Plaintiff;

(h) That Gar-Dal, Inc. failed to complete, or allowed others to fail to complete, portions of the interior of the building, the landscaping of the grounds, and the preparation and paving of parking areas, as required by the plans and specifications; and

(i) That the plans and specifications for the building submitted to the City of Dallas in order to secure a Certificate of Occupancy were not those plans and specifications approved by Plaintiff.

54. As a result of this sale of a security in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, Plaintiff requests this Court to rescind the purchase transaction, the Transfer, and all other contracts, and to cancel all conveyances of real property or interests therein entered into between Plaintiff and Murray Investment, Gar-Dal, Inc., and the shareholders of Gar-Dal, Inc., allowing Plaintiff to recover as damages the full amount of the

consideration in the amount of $1,050,000.00 paid for the security, together with interest thereon as provided in the Note from the date of the sale to Plaintiff until paid, together with the sum of not less than $725,000.00, being the sum expended by Plaintiff in direct reliance upon the misrepresentations of Defendants.

SIXTH CLAIM FOR RELIEF

XVII.

Incorporation

55. Paragraphs 1 through 27 inclusive and 44 through 53, are again alleged herein as though set forth in full.

XVIII.

Violation of Section 17(a) of the Securities Act of 1933

56. The manner and means used by Defendants is set forth in paragraphs 49 through 53 of Plaintiff's Fifth Claim for Relief above. The allegations contained in those paragraphs are realleged and incorporated herein by reference. The allegations recited in those paragraphs all reveal a violation of §17(a) of the Securities Act of 1933, as amended [15 U.S.C. 77(q)].

57. No registration statement with respect to the security described herein has been filed or is in effect with the Securities Exchange Commission.

58. As a result of this sale of a security in violation of Section 17(a) of the Securities Act of 1933, Plaintiff requests this Court to rescind the purchase transaction, the Transfer, all other contracts and to cancel all conveyances of real property or interests therein entered into between Plaintiff and Murray Investment, Gar-Dal,

Inc., and the shareholders of Gar-Dal, Inc., allowing Plaintiff to recover as damages the consideration in the amount of $1,050,000.00 paid for the security, together with interest thereon as provided in the Note from the date of the sale to Plaintiff until paid, and the sum of not less than $725,000.00, being the amount expended by Plaintiff in direct reliance upon the misrepresentations of Defendants.

XVIV.

Attorney Fees

59. Under its various, alternative claims for relief, Plaintiff is entitled to recover a reasonable attorneys' fee. Plaintiff would show the Court that it employed the services of the undersigned attorneys and agreed to pay them a reasonable fee.

WHEREFORE, Plaintiff demands:

(a) That Plaintiff have judgment under Plaintiff's First Claim for Relief (i) for rescission of the purchase transaction, the Transfer, and all other contracts and to cancel all conveyances of real property or interests therein entered into between Plaintiff and Murray Investment, Gar-Dal, Inc. and the shareholders of Gar-Dal, Inc., (ii) for payment by Murray Investment to Plaintiff the amount of $1,050,000.00 together with interest thereon as provided in the Note from the date of sale to Plaintiff until paid, and (iii) for damages in the amount of $725,000.00, such sum being the amount expended by Plaintiff in direct reliance upon the fraudulent acts and misrepresentations of Defendants; or, in the alternative,

(b) That Plaintiff have judgment under Plaintiff's

Second Claim for Relief for the difference between the value of the loan as represented to Plaintiff and the actual value of said loan on the date it was purchased, or in the alternative, for the difference between the value of the real estate securing such loan as represented to Plaintiff at the time of purchase (but not to exceed $1,050,000.00) and the actual value of the real estate securing such loan at that time, and in either event, for exemplary damages in twice the amount of Plaintiff's actual damages, as is provided by statute; or, in the alternative,

(c) That Plaintiff have judgment under Plaintiff's Third Claim for Relief for damages in the amount of the difference between the value of the loan as represented to Plaintiff and the actual value of said loan at the time of purchase and for exemplary damages in twice the amount of Plaintiff's actual damages; or in the alternative,

(d) That Plaintiff have judgment under Plaintiff's Fourth Claim for Relief (i) for rescission of the purchase transaction, the Transfer, and all other contracts, and to cancel all conveyances of real property or interests therein, entered into between Plaintiff and Murray Investment, Gar-Dal, Inc. and the shareholders of Gar-Dal, Inc., (ii) for the sum of $1,050,000.00 as actual damages together with interest thereon as provided in the Note from the date of sale to Plaintiff until paid, (iii) the sum of not less than $725,000.00, being the amount expended by Plaintiff in direct reliance upon the misrepresentations of Defendants, and (iv) for exemplary damages in twice the amount of Plaintiff's actual

damages, as provided by statute; or, in the alternative,

(e) That Plaintiff have judgment under Plaintiff's Fifth Claim for Relief (i) for rescission of the purchase transaction, the Transfer and to cancel all conveyances of real property or interests therein entered into between Plaintiff and Murray Investors and Gar-Dal, Inc., (ii) for the sum of $1,050,000.00 as actual damages together with interest thereon as provided in the Note from the date of sale to Plaintiff until paid and, (iii) the sum of not less than $725,000.00, being the amount expended by Plaintiff in direct reliance upon the misrepresentations of Defendants; or, in the alternative,

(f) That Plaintiff have judgment under Plaintiff's Sixth Claim for Relief (i) for rescission of the purchase transaction, the Transfer and to cancel all conveyances of real property or interests therein entered into between Plaintiff and Murray Investors and Gar-Dal, Inc., (ii) for the sum of $1,050,000.00 as actual damages together with interest thereon as provided in the Note from the date of sale to Plaintiff until paid and, (iii) the sum of not less than $725,000.00, being the amount expended by Plaintiff in direct reliance upon the misrepresentations of Defendants; and,

FURTHER, Plaintiff demands costs of suit, attorneys fees, and such other relief, general or special, in law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

COKE & COKE

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The Life Insurance Company
of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
NO. CA 3-76-0521-F

THE LIFE INSURANCE
COMPANY OF VIRGINIA,
Plaintiff,

vs.

THE MURRAY INVESTMENT COMPANY
and MURRAY ADVISORY CORPORATION,
Defendants

FIRST AMENDED PRE-TRIAL ORDER

1. *SUMMARY OF CLAIMS AND DEFENSES:* The plaintiff's claims stem from a transaction whereby the plaintiff, pursuant to a permanent loan commitment, purchased a note from The Murray Investment Company ("Murray Investment"), secured by a first deed of trust lien on a newly-constructed office building. The borrower was Gar-Dal, Inc. ("Gar-Dal"), and the note was guaranteed by O. K. Jones, Individually and d/b/a/ O. K. Jones Construction Company ("Jones"), R. L. McSpedden ("McSpedden"), Charles C. Shaver ("Shaver"), Paul Hamby ("Hamby") and Ted Hunt, Jr. ("Hunt"). The plaintiff claims that Murray Advisory Corporation ("Murray Advisory") conspired with Murray Investment in defrauding the plaintiff in the purchase of the note. Specifically, the plaintiff claims that the defendants conspired to tell, and did tell, the

plaintiff certain facts which are not true concerning the improved real estate securing the note. The plaintiff originally included Gar-Dal, Jones, McSpedden, Shaver, Hamby and Hunt as defendants. The claims against such entity and former parties have been removed from contention and should not be considered by the jury. In addition, the plaintiff claims that the defendants failed to tell the plaintiff certain facts that were material. The plaintiff contends that these misstatements and omissions were misleading, material and that they were relied on by the plaintiff to its detriment.

The plaintiff claims that by reason of their actions, the defendants have violated the common law, the Texas Business and Commerce Code (fraud in a transaction involving real estate), the Texas Securities Act, the Securities Act of 1933, and the Securities Exchange Act of 1934. The plaintiff also claims that Murray Investment breached a contract between the plaintiff and Murray Investment and that the defendants conspired to breach the contract whereby the plaintiff was to purchase the note. The plaintiff seeks rescission of its agreement to purchase the note, with a return to it of the principal amount paid, plus damages which the plaintiff incurred in direct release upon the misrepresentations and omissions. Alternatively, the plaintiff seeks damages, including punitive damages. The plaintiff also seeks to recover its attorneys' fees.

Murray Investment and Murray Advisory ("Murray') deny that they made any misrepresentations or omissions of material fact to plaintiff. Murray states that it had no reason to believe that any information it furnished to the plaintiff was false and in fact Murray

believed such information to be true. Murray claims that plaintiff relied upon its own evaluation of the facts, the financial condition of the guarantors of the note, and the overall value of the security in deciding to purchase the note. Murray asserts that the inspections performed were not required to be the same as those that would have been performed by an architect, that it properly performed these inspections, and that at the time the note was purchased the building had been completed substantially in accordance with the plans and specifications. Murray contends that under the existing circumstances it was reasonable to rely upon the city's inspections and the certificate of occupancy granted by the city. Murray claims that the owner led it to believe that the city was responsible for filling in a ditch which made it impossible to complete the parking lot according to the plans and specifications, and Murray reasonably relied upon this fact.

Additionally, Murray claims that when the Life Insurance Company of Virginia purchased the property at foreclosure and obtained a judgment against the owners, this satisfied any rights the plaintiffs had. Moreover, Murray claims that when the plaintiff cancelled its correspondent agreement with Murray, this also terminated any claim that the plaintiff had against Murray. Murray also asserts that the note is not a security, and that the purchase of the note did not constitute fraud in connection with a transaction involving real estate. Murray further claims that, by virtue of the plaintiff's settlement with the other defendants, the plaintiff's claims against Murray must be proportionately reduced.

Murray claims that any damages sustained by the plaintiff were caused by the lack of income from the building, that this was the result of the real estate market and the fact that the plaintiff failed to enforce its rights under assignments of rents and leases as to leases executed by Jones, Shaver and Hamby for approximately half the building. Murray claims that even when it expressly stated to the plaintiff, shortly after sale of the note, that the building was unoccupied, the plaintiff raised no objection to this. Murray contends that the evidence will show that the plaintiff has also failed to pursue opportunities to sell the building, has failed to minimize its damages claimed in this suit, and in fact has changed many parts of the building from the original plans and specifications and the use intended. Murray would also show that the plaintiffs are attempting to collect for alleged damages to which they are not entitled.

Murray claims that the plaintiff has unreasonably delayed in seeking to rescind the purchase of the note, that the plaintiff is estopped to assert its claims and has waived any noncompliance with the terms of the commitment.

Murray Investment and Murray Advisory filed a Third Party Claim against Continental Steel Company ("Continental"), alleging that if Murray Investment and Murray Advisory are found to be liable to the plaintiff by reason of defects in the structural steel, then Continental should be required to reimburse and indemnify Murray for any damages assessed thereby. Continental denied the material allegations of the third party complaint by Murray Investment and Murray Advisory and denied

that the court has subject matter jurisdiction. In addition, Continental asserts that Murray Investment lacks standing to bring the Third Party Claim. Moreover, Continental claims that any deviations from the plans and specifications were required by Jones. Continental alleges that, by virtue of their acts and courses of conduct, Murray Investment and Murray Advisory are estopped to assert any claims with respect to the defects in the structural steel and have waived any right to claims concerning the structural steel because of Murray Investment's inspection and approval of work performed by Continental and that Murray Investment and Murray Advisory ratified Continental's deviation from the plans and specs. In addition Continental claims that the contract between it and Jones was not for the benefit of Murray Investment and Murray Advisory. Continental also claims that the Third Party Claim fails to state a claim on which relief can be granted, that subject matter jurisdiction is lacking and that the claim is barred by limitations.

2. *STIPULATED FACTS:* The plaintiff is an insurance company incorporated and existing under the laws of the State of Virginia and has its principal office and place of business in Richmond, Virginia. Murray Investment is a Texas corporation with its principal office and place of business in Dallas, Texas. Murray Advisory is a Texas corporation with its principal office and place of business in Dallas, Texas. Continental is a Texas corporation with its principal office and place of business in Garland, Texas.

On or about April 18, 1973, the plaintiff and Murray

Investment entered into a correspondent agreement for the servicing of mortgage loans. On May 14, 1973, the plaintiff agreed to purchase a first mortgage loan to Gar-Dal, Inc. for $1,050,000.00.

In August, 1973, Murray Mortgage Investors loaned Gar-Dal, Inc. the sum of One Million Fifty Thousand and No/100 Dollars ($1,050,000.00) for construction of an office building. Jones was the general contractor for the building, and Continental was the structural steel subcontractor. The note was guaranteed by the shareholders of Gar-Dal — Jones, McSpedden, Shaver, Hamby and Hunt — and was secured by a deed of trust on the realty and assignments of rents and leases. The note, assignments of rents and leases and security agreements evidencing that loan were assigned to Murray Investment, who then sold the note and transferred the assignments of rents and leases and the security agreements to the plaintiff in December, 1974 for the amount of One Million Fifty Thousand and No/100 Dollars ($1,050,000.00). This is the note that the plaintiff had issued a commitment letter on May 14, 1973, agreeing to purchase from Murray Investment.

After Gar-Dal failed to make payments due under the note, the plaintiff foreclosed and purchased the realty in question at foreclosure on June 3, 1975 for $750,000.00. After the foreclosure sale, the plaintiff sued Gar-Dal and the guarantors of the note and obtained a judgment for the deficiency between the sale price at foreclosure and the amount due on the note. The plaintiff is still the owner of the building.

3. *CONTESTED ISSUES OF FACT*:

(a) Whether Murray Investment made certain mis-

representations of fact or failed to state certain material facts to the plaintiff which caused the plaintiffs to purchase the note?

(b) Whether, at the time Life of Virginia purchased the note, Murray Investment had knowingly or recklessly carried out a device, scheme or artifice in order to defraud Life of Virginia by making misrepresentations of material facts or by omitting to state certain material facts to the plaintiff which, considered in the light of the circumstances under which such alleged omissions occurred, made other statements by Murray Investment misleading.

(c) Whether any such fraudulent misrepresentations or omissions were reasonably relied upon by Life of Virginia in the exercise of due diligence.

(d) In the event Life of Virginia reasonably relied upon such fraudulent misrepresentations or omissions in the exercise of due diligence, whether Life of Virginia has suffered any monetary loss as a proximate cause of wrongdoing of Murray Investment and if so, the amount thereof.

(e) Whether, if Murray Investment used such a device, scheme or artifice, it was the result of a conscious and direct attempt on the part of Murray Investment to defraud Life of Virginia.

(f) Whether, at the time Life of Virginia agreed to purchase the note, it exercised due diligence in investigating the facts.

(g) Whether Murray Investment breached the terms of the plaintiff's commitment letter.

(h) Whether Murray Advisory, Gar-Dal, Inc., Jones, Shaver, Hamby, McSpedden and Hunt, engaged in a conspiracy with Murray Investment in the misrepresentations and omissions, if any, to the plaintiff.

(i) Whether Gar-Dal, Inc., Jones, Hunt, Shaver, Hamby or McSpedden made any material misrepresentations, or omitted to state any material facts to the defendants Murray Investment or Murray Advisory.

(j) Whether Life of Virginia mitigated any damages it may have suffered.

(k) Whether the plaintiff by its acts or courses of conduct waived any noncompliance with material conditions to the loan commitment.

(l) Whether, during construction of the building, Continental knew or had reason to know that the building constituted part of the security for a loan on the building and that Murray Investment or Murray Advisory expected the steel to be erected substantially in accordance with plans and specifications and in a workmanlike manner.

(m) Whether Continental and Jones entered into their contract with respect to structural steel with the intention to benefit Murray Investment or Murray Advisory.

(n) Whether the fabrication or erection of the structural steel was defective or deviated from the plans and specifications.

(o) Whether any deviations from the plans and specifications with respect to structural steel were required by Jones.

(p) Whether any deviations from the plans and specifications with respect to structural steel were consented to and/or accepted by Murray Investment and/or Murray Advisory.

(q) Whether Murray Investment and/or Murray Advisory engaged in acts or courses of conduct by virtue of which they are estopped to make claims with respect to defects in structural steel or deviations from the plans and specifications.

(r) Whether Murray Investment and/or Murray Advisory engaged in acts or courses of conduct by virtue of which they have waived any claims with respect to defects in structural steel or deviations from the plans and specifications.

(s) Whether Life of Virginia suffered any damages as a result of anything Continental did or did not do.

(t) Whether Murray Investment and Murray Advisory ratified the acts of Continental in deviating from the plans and specifications for the building.

4. *CONTESTED ISSUES OF LAW:*

(a) Whether the note is a security under the Texas Security Act, the Securities Act of 1933 and the Securities Exchange Act of 1934.

(b) Whether Life of Virginia has released Murray Investment from any liability to it on the claims asserted herein, and whether the plaintiff's settlement with the other defendants constitutes a proportional release of its claims as to Murray Investment and Murray Advisory.

(c) Whether Life of Virginia is guilty of laches and is therefore barred from the equitable relief sought herein.

(d) Whether Life of Virginia is estopped to assert the claims asserted herein.

(e) Whether Life of Virginia has waived any non-compliance with material terms to the loan commitment.

(f) Whether Murray Investment breached the terms of Life of Virginia's commitment letter.

(g) Whether Life of Virginia is entitled to rescission.

(h) Whether the purchase of the note is a transaction involving real estate under Tex. Bus. & Comm. Code Ann. Sec. 27.01.

(i) Whether Life of Virginia is entitled to recover interest.

(j) Whether Life of Virginia is entitled to recover the measure of damages sought.

(k) Whether Life of Virginia is entitled to recover exemplary damages.

(l) Whether the alleged acts and omissions constitute violations of the securities laws due to lack of scienter.

(m) Whether Life of Virginia is entitled to recover attorneys' fees.

(n) Whether Murray Investment and Murray Advisory lack standing to bring the Third Party Action.

(o) Whether Murray Investment or Murray Advisory were creditor or donee third party beneficiaries of the contract between Continental and Jones with respect to structural steel.

(p) Whether Continental owed any duty of any nature to Murray Investment or Murray Advisory with respect to its fabrication and erection of the structural steel.

(q) What is the correct measure of damages with respect to the Third Party Claim.

(r) Whether this Court has jurisdiction to hear the Third Party Claim.

(s) Whether the Third Party Claim states a claim for which relief can be granted.

(t) Whether the Third Party Claim is barred by the statute of limitations.

5. *ESTIMATED LENGTH OF TRIAL:* Two weeks.

6. *ADDITIONAL MATTERS:*

(a) Continental Steel has filed a motion to dismiss.

(b) The parties have requested three sets of jury strikes.

Respectfully submitted,

By /s/ E. Russell Nunnally
Attorneys for Plaintiff

Rain Harrell Emery Young & Doke

By /s/ Robert W. Jordan
Attorneys for Defendants The Murray Investment Co. and Murray Advisory Corp.

Geary, Stahl & Spencer

By /s/ D. Ronald Reneker
Attorneys for Third Party Def. Continental Steel Company

SIGNED and ENTERED this 27th day of March, 1979.

/s/ Robert W. Porter
Robert W. Porter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. CA 3-76-0521-F

THE LIFE INSURANCE
COMPANY OF VIRGINIA

vs.

THE MURRAY INVESTMENT CO., ET AL

vs.

CONTINENTAL STEEL CO.

COURT'S CHARGE TO THE JURY

Members of the Jury:

Now that you have heard the evidence and the argument of counsel, it is my duty to give you the Court's instructions as to the laws that are applicable to this case. In arriving at your verdict, and in your deliberations, it is your duty to follow these instructions and to apply the rules of law here given to you and to find the facts of this case from the evidence introduced at the trial and in accordance with these rules of law.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

You are the sole and exclusive judges of the facts. You should determine these facts without any bias, prejudice, sympathy, fear or favor, and this determination should be made from a fair consideration of all the evidence that

you have seen and heard in this trial. Do not speculate on matters which are not in evidence, and you should never discuss this case with anyone until such time as you are discharged, except among yourselves when you have been retired to deliberate your verdict.

You are not bound by any opinion which you might think the Court has concerning the facts in this case, and if I have in any way said or done anything which leads you to believe that I have any opinions about the facts in this case, you are here instructed to disregard them. Further, nothing in these instructions to you is made for the purpose of suggesting or conveying to you any intimation as to what verdict I think you should find.

You are instructed that the statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the position and contentions of the parties to this suit. The jury should not consider or be influenced by the facts that during the trial of this case, counsel have made objections to the testimony, as it is their duty to do so, and it is the duty of the Court to rule on them in accordance with the law.

It is the function of the jury to determine the credibility of each witness and to determine the weight to be given his testimony. In weighing the testimony of a witness, you should give that testimony careful scrutiny. Consider all of the circumstances under which the witness testified, his appearance and demeanor while on the witness stand, his apparent candor and fairness, or the lack thereof, the reasonableness or unreasonableness of his testimony, the interest, if any, he has in the outcome of the case, and the extent to which he

is contradicted or supported by other credible evidence. You will rely on your own good judgment and common sense in considering the evidence and determining the weight to be given it.

The burden is upon the plaintiff to prove every essential element of his claim by a preponderance of the evidence, unless I instruct you otherwise. Likewise, the burden is upon those asserting affirmative defenses to prove every essential element of that defense by a preponderance of the evidence, unless I instruct you otherwise.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. Preponderance of the evidence does not require proof to an absolute certainty, because such a degree of proof is seldom possible.

The testimony of a single witness, which produces in your minds the belief of the likelihood of truth, is sufficient for the proof of any fact, even though a greater number of witnesses may have considered all the other evidence.

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in the case. One is direct evidence — such as testimony of an eye-witness. The other is indirect or circumstantial evidence — the proof of a chain of

circumstances which point to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial.

Do not decide who you think should win and then try to answer the questions. You will not decide any issue by lot, by drawing straws, or by the use of any other method of chance. Do not reach your result by adding together each juror's figures and dividing by the number of jurors to get an average. Further, do not do any trading on your answers as your answers and verdict must be unanimous; that is, all of the jurors must agree to each of your answers.

You may ask what is evidence. Well, evidence consists of testimony, that is to say the sworn statements that were given by the witnesses here on the witness stand (including deposition testimony) both on direct examination and cross-examination. And it includes all of the exhibits which were received into evidence and most, if not all of them, will go out with you for your analysis and consideration, and you may use and look at those to whatever extent you find necessary. They are rather voluminous. I would suggest that you try to avoid being what in the vernacular might be said to be "snowed under" by reason of the documents. The documents have been argued to you by counsel and I think that those that you will find of help and significance will not be difficult for you to properly consider.

The evidence also consists of stipulations if any, that may have been made between counsel during the course

of the trial as to factual issues.

You are instructed that representatives of either party are competent witnesses to testify in their own behalf in a suit. The jury should not disregard such testimony merely because the witness is interested in your verdict, but you should consider the testimony in connection with all of the evidence in the case, and give that testimony such weight and credit as you believe it entitled to receive, after taking into consideration all of the facts and circumstances in the case.

All of the present parties in this case are business corporations. Everyone who comes into a court of law is entitled to equal justice. The fact that some of the parties here are corporations makes no difference. Corporate parties are entitled to the same fair, impartial and unprejudiced treatment as individuals under like circumstances. From time to time in these instructions, I may use the word "persons"; this term includes corporations as well as individuals.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

It is the duty of the Court to establish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

Also, there may have been some testimony that at the time I told you it was admitted for a particular purpose and no other. If that is so, then you should consider it only for that purpose and you should not consider it for any other purpose whatsoever.

I would also point out to you that the conferences that were held out of your presence were not conducted for the purpose of keeping anything from you which would be proper for this jury to consider, but to be sure insofar as it is possible for us to do so, that you would hear only such testimony and there would only be received such evidence as is, under the law, proper for a jury to consider.

During the course of the trial, I occasionally asked questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have been related. Remember at all times that you, as jurors, may disregard entirely all comments of the Court in arriving at your own findings as to the facts, since you are the sole judge of the facts.

In this case certain persons were permitted to testify as expert witnesses. When a witness is called as an expert in a particular field of technical knowledge or learning and is allowed to express opinions on matters within that field, such opinions are offered for the aid and assistance of the jury but not for the purpose of invading the jury's function in finding facts.

In determining the value, weight and significance to be given such opinions, you should consider the extent of the qualification, experience and ability of the witness and the soundness of the study and data on which the opinions of the witness were based.

Insofar as the testimony of an expert witness is based on personal observation of particular facts and conditions, it is to be considered by you the same as that of any other witness. However, the opinions of experts based on hypothetical assumptions of fact do not tend to prove the assumed facts upon which the opinions are based. The actual facts must be found by the jury from the basic evidence itself and not from assumptions of facts adopted by expert witnesses in forming opinions or in preparing summaries, computations, or other exhibits.

The jury is not bound to find facts according to expert testimony, but such testimony may be considered by the jury in connection with all the other evidence in the case.

Let me re-emphasize that it is for you, as judge of the facts, to consider the expert testimony and give it such weight as you may think it deserves. If you should decide that such opinions are not based upon sufficient education or experience, or if you should conclude that the reasons given in support of such opinions are not sound, or if you feel that they are outweighed by other evidence, you may disregard such opinions entirely.

The mere fact that plaintiff has seen fit to join two separate parties as defendants does not mean that either of them is liable. Plaintiff's claims must be judged separately as to each defendant, and the position of each defendant should be judged on its own merits. This is especially true wherever the facts, circumstances or nature of the charges made or defenses asserted differ with regard to one defendant from the other defendant.

The plaintiff's claims stem from a transaction whereby the plaintiff, pursuant to a permanent loan commitment,

purchased a note from The Murray Investment Company, secured by a first deed of trust lien on a newly-constructed office building. The borrower was Gar-Dal, Inc. and the note was guaranteed by O. K. Jones, individually and d/b/a/ O. K. Jones Construction Company, R. L. McSpedden, Charles C. Shaver, Paul Hamby and Ted Hunt, Jr. The plaintiff claims that Murray Advisory Corporation conspired with Murray Investment in defrauding the plaintiff in the purchase of the note. Specifically, the plaintiff claims that the defendants conspired to tell, and did tell, the plaintiff certain facts which were not true concerning the improved real estate securing the note. The plaintiff originally included Gar-Dal, Jones, McSpedden, Shaver, Hamby and Hunt as defendants. The claims against such former parties have been removed from contention and should be considered by the jury only insofar as the questions which follow inquire about them. In addition, the plaintiff claims that the defendants failed to tell the plaintiff certain facts that were material. The plaintiff contends that these misstatements and omissions were misleading, material and that they were relied on by the plaintiff to its detriment. Murray Investment and Murray Advisory deny that they made any misrepresentations or omissions of material fact to plaintiff. Murray states that it had no reason to believe that any information it furnished to the plaintiff was false and in fact Murray believed such information to be true. Murray claims that plaintiff relied upon its own evaluation of the facts. Murray also claims that it was reasonable to rely upon the representations of others concerning the building.

Murray Investment and Murray Advisory filed a Third Party Claim against Continental Steel Company alleging that if Murray Investment and Murray Advisory are found to be liable by the plaintiff by reason of defects in the structural steel, then Continental should pay Murray Investment and Murray Advisory. Continental denied that there were any defects in the structural steel for which it was responsible. Continental asserts that if there were any defects, Murray Investment and Murray Advisory waived any complaints about defects or ratified same.

The parties have stipulated that on or about April 18, 1973, the plaintiff and Murray Investment entered into a correspondent agreement for the servicing of mortgage loans. On May 14, 1973, the plaintiff agreed to purchase a first mortgage loan to Gar-Dal, Inc. for $1,050,000.00.

In August, 1973, Murray Mortgage Investors agreed to loan Gar-Dal, Inc. the sum of One Million Fifty Thousand and no/100 Dollars ($1,050,000.00) in installments for construction of an office building. Jones was the general contractor for the building, and Continental was the structural steel subcontractor. The note was guaranteed by the shareholders of Gar-Dal — Jones, McSpedden, Shaver, Hamby and Hunt — and was secured by a deed of trust on the realty and assignments of rents and leases. The note, assignments of rents and leases and security agreements evidencing that loan were assigned to Murray Investment, who then sold the Note, (hereinafter referred to as the "Note" in this charge) and transferred the assignments of rents and leases and the security agreements to the plaintiff in December, 1974 for the amount of One Million Fifty

Thousand and No/100 Dollars ($1,050,000.00). This is the Note that the plaintiff had issued a commitment letter on May 14, 1973, agreeing to purchase from Murray Investment.

After Gar-Dal failed to make payments due under the Note, the plaintiff foreclosed and purchased the realty in question at foreclosure on June 3, 1975 for $750,000.00. After the foreclosure sale, the plaintiff sued Gar-Dal and the guarantors of the note and obtained a judgment for the deficiency between the sale price at the foreclosure and the amount due on the note. The plaintiff is still the owner of the building.

1. Do you find from a preponderance of the evidence that there was a "conspiracy", as that term is explained in my instructions, between Murray Investment Co. and Murray Advisory Corporation to make a false representation of a past or existing material fact required by the terms of the loan commitment which was relied upon by the Life Insurance Company of Virginia in connection with its purchase of the note and which was made for the purpose of inducing Life Insurance Company of Virginia to purchase the note?

You are instructed that a conspiracy is a combination of two or more persons acting in concert to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.

In order to find that the defendants Murray Investment Co. and Murray Advisory Corporation conspired to achieve a certain purpose, the evidence need not show that the conspirators entered into any express or formal agreement, or that they directly, or by words or

in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. The evidence need only show, by a preponderance thereof, that the conspirators in some way or manner, or through some contrivance came to a mutual understanding to try to accomplish a common plan.

In this regard, plaintiff's claim must be judged separately as to each defendant, and the position of each defendant must be judged on its own merits. Each defendant is entitled to individual consideration of the particular evidence applicable to it before you determine whether that particular defendant participated in any conspiracy. You cannot return a verdict against either defendant on the conspiracy charges made by the plaintiff unless you specifically find that one defendant conspired with the other defendant to intentionally defraud the plaintiff.

Since a conspiracy is a combination of two or more persons acting in concert to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means, a conspiracy is a kind of unlawful partnership in which each member becomes the agent of every other member once the conspiracy has been established. The essence of such a conspiracy is a combination or agreement to violate or disregard the law. It is your job to determine if the defendants entered into such an unlawful agreement. Mere similarity of conduct among various persons or corporations and the fact that they may have at times associated with each other, or met with each other, and discussed common aims and interests, does not necessarily establish proof of the

existence of a conspiracy.

A defendant does not become a party to a conspiracy merely by rendering services to it. As I have mentioned before, you cannot return a verdict against a particular defendant unless you find that that defendant knew of the conspiracy and participated in it.

If it is established by a preponderance of the evidence in the case that a conspiracy existed, and that a defendant was one of the members of the conspiracy, then the statements thereafter knowingly made, and the acts thereafter knowingly done, in furtherance of and within the scope of the conspiracy, by any person likewise found to be a member of the conspiracy, may be considered by the jury as evidence in the case as to the defendant found to have been a member. Otherwise, any admission or statement made or act done outside of the court, by one person, may not be considered as evidence in the case against any person who was not present and heard the statements made, or saw the act done. Each defendant's connection with the alleged conspiracy must be established by independent proof received as to it, by evidence received as to it of its own acts, its own statements, its own conduct, and the reasonable inferences to be drawn therefrom.

Before a conspiracy can be said to have been proved by circumstantial evidence alone, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such conspiracy, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from circumstances

proved by the evidence, one consistent with the existence of the conspiracy from such circumstances alone.

If you should determine that there was such a conspiracy to intentionally defraud the plaintiff, then in order for you to find that any individual defendant participated in that conspiracy, it must be shown that said defendant had knowledge of the existence of that conspiracy and that it knowingly performed an act designed to promote or aid in the attainment of the object of that known conspiracy. In order to find that a defendant had knowledge of the conspiracy, if any, the evidence of the knowledge must be clear and not equivocal.

You are instructed that the plaintiff in this case relies upon circumstantial evidence to establish the existence of the alleged conspiracy, on the part of the defendants herein. In this connection, you are instructed that although circumstantial evidence may be relied upon to establish the existence of a conspiracy, you must find that such circumstances are consistent with the existence of such conspiracy. The circumstances by which plaintiff seeks to establish such facts must be consistent with each other, and such circumstances must be inconsistent with any other reasonable inference or hypothesis except that of the existence of a conspiracy. Proof of conspiracy requires more than mere suspicion or conjecture, and there must be either direct proof of conspiracy or circumstantial evidence sufficiently strong to give rise to an inference of a conspiracy.

You are instructed that facts are "material" if it appears that the transaction would not have been undertaken had the representation not been made.

ANSWER "YES" OR "NO".

ANSWER:/Yes

Proceed to answer Question No. 2.

2. Do you find from a preponderance of the evidence that any of the following persons or corporations made a false representation to the Life Insurance Company of Virginia for the purpose of inducing it to purchase the Note?

ANSWER "YES" OR "NO" beside each name.

Murray Investment Company./Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./No.
O. K. Jones./No.
Ted Hunt, Jr./No.
Charles Shaver./No.
R. L. McSpedden./No.
Paul Hamby./No.

3. Do you find from a preponderance of the evidence that any false representation you have found in answer to Question No. 2 was a false representation of a past or existing material fact?

You are instructed that facts are "material" if it appears that the transaction would not have been undertaken had the representation not been made.

ANSWER "YES" OR "NO" beside each name as to each corporation or individual you answered "Yes" to in Question No. 2.

Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./(no answer)

O. K. Jones/no answer
Ted Hunt, Jr./(no answer)
Chares Shaver/(no answer)
R. L. McSpedden/(no answer)
Paul Hamby/(no answer)

4. Do you find from a preponderance of the evidence that any false representation of a past or existing material fact that you have found in Question No. 3 was a fact which was relied upon by the Life Insurance Company of Virginia, in connection with its purchase of the Note?

ANSWER "YES" OR "NO" beside each name as to each corporation or individual you answered "Yes" to in Question No. 3.

Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./(no answer)
O. K. Jones/(no answer)
Ted Hunt, Jr./(no answer)
Charles Shaver/(no answer)
R. L. McSpedden/(no answer)
Paul Hamby/(no answer)

5. Do you find from a preponderance of the evidence that any false representation of a past or existing material fact you have found in answer to Question 4 was as to a fact required by the terms of the loan commitment?

ANSWER "YES" OR "NO" beside each name as to each corporation or individual you answered "Yes" to in Question No. 4.

Murray Investment Company/Yes

Murray Advisory Corp./Yes
Gar-Dal, Inc./(no answer)
O. K. Jones/(no answer)
Ted Hunt, Jr./(no answer)
Charles Shaver/(no answer)
R. L. McSpedden/(no answer)
Paul Hamby/(no answer)

6. Answer Question 6 if you have answered "Yes" to any part of either Question 1 or Question 4; otherwise, do not answer Question No. 6 and proceed to Question 16.

Do you find from a preponderance of the evidence that any false representation of a past or existing material fact you have found in answer to Question No. 1 or Question No. 4 was the proximate cause of damages to Life Insurance Company of Virginia?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

There may be more than one proximate cause of an event.

ANSWER "YES" OR "NO" beside each name as to each corporation or individual you answered "Yes" to in Question No. 4.

Murray Investment Company/Yes
Murray Advisory Corp./Yes

Gar-Dal, Inc./no
O. K. Jones/no
Ted Hunt, Jr./no
Charles Shaver/no
R. L. McSpedden/no
Paul Hamby/no

Proceed to answer Question No. 7.

7. Do you find from a preponderance of the evidence that on December 17, 1974 the actual fair market value of both the land and the building which secured the Note was less than the amount of the Note ($1,050,000.00)?

ANSWER "YES" OR "NO".

Answer/No.

Proceed to Answer Question 8.

8. Do you find from a preponderance of the evidence that on December 17, 1974 the actual fair market value of both the land and the building which secured the Note was less than the fair market value of the land and building as represented to Life Insurance Company of Virginia on December 17, 1974?

ANSWER "YES" OR "NO".

Answer/Yes.

Answer Question No. 9 if you answered "Yes" to Question No. 7.

9. What sum of money do you find from a preponderance of the evidence represented the difference, if any, on December 17, 1974 (between (1) the amount of the Note ($1,050,000.00), and (2) the actual fair market value of the land and the building which secured the Note?

ANSWERED IN DOLLARS AND CENTS, OR NONE.

Answer/ —0—

Answer this question if you answered "Yes" to Question No. 8.

10. What sum of money do you find from a preponderance of the evidence represented the difference, if any, on December 17, 1974 between: (1) the fair market value of the land and the building as represented to Life Insurance Company of Virginia, and (2) the actual fair market value of both the land and the building?

ANSWER IN DOLLARS AND CENTS, OR NONE.

Answer/$450,000.

Answer this question if you answered Question No. 9 by stating an amount.

11. Do you find from a preponderance of the evidence that any portion of the difference between: (1) the amount of the Note ($1,050,000.00) and (2) the actual fair market value of the land and building which secured the Note that you found in Question No. 7 was proximately caused by any false representation you answered "Yes" to in your answer to either Question 1 or Question No. 4?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred, and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER "YES" OR "NO".

Answer/—0—

Answer Question No. 12 if you have answered 10 by stating an amount.

12. Do you find from a preponderance of the evidence that any portion of the difference between: (1) the fair market value of the land and building as represented to Life Insurance Company of Virginia, and (2) the actual fair market value of both the land and the building that you found in answer to Question No. 8 was proximately caused by any false representation you answered "Yes" to in your answer to either Question No. 1 or Question No. 4?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

There may be more than one proximate cause of an event.

ANSWER "YES" OR "NO".

Answer/Yes

Answer Question 13 if you answered Question No. 11.

13. What do you find from a preponderance of the evidence to be the percentage of any sum of money you found in answer to Question 9 which was proximately caused by any false representation you answered "Yes"

to in your answer to either Question No. 1 or Question No. 4?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

Answer by stating the percentage.

Answer —0—

Answer Question 14 if you answered Question 12.

14. What do you find from a preponderance of the evidence to be the percentage of any sum of money you found in answer to Question 10 which was proximately caused by any false representation you answered "Yes" to in your answer to either Question No. 1 or Question No. 4?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

Answer by stating the percentage.

Answer/100%

Proceed to answer Question No. 15.

15. What sum of money, if any, do you find a preponderance of the evidence should be awarded to the Life Insurance Company of Virginia as exemplary damages, as that term is defined herein?

"Exemplary damages" means an amount which you may in your discretion award as an example to others and as a penalty by way of punishment for a wrongful act done willfully if the facts warrant the same.

You are instructed that an act is done "willfully" if done knowingly, intentionally, deliberately or designedly.

The award of exemplary damages is in addition to the amount that the Court determines from your answer that you have awarded in actual damages.

Answer in dollars and cents, or none.

Answer/$500,000

Proceed to answer Question No. 16.

16. Do you find from a preponderance of the evidence that Murray Investment Co. breached its contract by making any of the following false representations or omissions:

(a) falsely represented to Life Insurance Company of Virginia that the property was substantially constructed and completed according to the plans and specifications which were submitted at the time of the application for the permanent loan.

(b) falsely represented that Hamby and Shaver jointly leased 20,000 square feet of the building.

(c) falsely represented that Jones individually leased 2,000 square feet of the building.

(d) falsely represented that Hamby and Shaver accepted and occupied the premises upon completion of construction of the building.

(e) falsely represented that Jones individually accepted and occupied the building upon completion of construction.

(f) made false representations to Life Insurance Company of Virginia in quarterly inspection reports.

ANSWER "YES" OR "NO" as to (a) through (f).

(a) Yes
(b) No
(c) No
(d) Yes
(e) No
(f) Yes

If you answered "Yes" to any paragraph in (a) through (f), then answer Question No. 17.

17. Do you find from a preponderance of the evidence that any of the representations or omissions you have found in Question No. 16 were known by any of the following to be false at the time made?

ANSWER "YES" OR "NO", as to each representation to which you answered "Yes" in Question No. 16 as to each of the following:

(a) Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./No
O. K. Jones/No
Ted Hunt, Jr./No
Charles Shaver/No

R. L. McSpedden/No
Paul Hamby/No

(b) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(c) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(d) Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./No
O. K. Jones/No
Ted Hunt, Jr./No
Charles Shaver/No
R. L. McSpedden/No
Paul Hamby/No

(e) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____

Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(f) Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./No
O. K. Jones/No
Ted Hunt, Jr./No
Charles Shaver/No
R. L. McSpedden/No
Paul Hamby/No

18. Do you find from a preponderance of the evidence that any false representation or omission you have found in Question 17 was "material" to the contract?

You are instructed that facts are "material" if it appears that the transaction would not have been undertaken had the representation not been made.

ANSWER "YES" OR "NO" as to each corporation or individuals you answered "Yes" to in Question No. 17.

(a) Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(b) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____

Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(c) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(d) Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(e) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(f) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____

O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

19. Do you find from a preponderance of the evidence that any false representation or omission you have found was relied upon by Life Insurance Company of Virginia?

ANSWER "YES" OR "NO" as to each corporation or individual you answered "Yes" to in Question No. 18.

(a) Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(b) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(c) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____

Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(d) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(e) Murray Investment Company/_____
Murray Advisory Corp./_____
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

(f) Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

20. Do you find from a preponderance of the evidence that on December 17, 1974 the actual fair market value of the Note was less than the amount of the Note ($1,050,000)?

ANSWER "YES" OR "NO".

Answer/Yes.

21. What sum of money do you find from a preponderance of the evidence represented the difference, if any, between the amount of the Note ($1,050,000) and the actual fair market value of the Note on December 17, 1974?

ANSWER IN DOLLARS AND CENTS, OR NONE.

Answer/$300,000

22. Do you find from a preponderance of the evidence that any portion of the difference between: (1) the amount of the Note ($1,050,000) and (2) the actual fair market value of the Note on December 17, 1974 that you found in Question 21 was proximately caused by any false representation you answered "Yes" to in your answer to Question 19?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

ANSWER "YES" OR "NO" AS TO EACH CORPORATION OR INDIVIDUAL THAT YOU ANSWERED "YES" TO IN QUESTION 17.

Murray Investment Company/Yes
Murray Advisory Corp./Yes
Gar-Dal, Inc./_____

O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

23. What do you find from a preponderance of the evidence to be the percentage of any sum of money you found in answer to Question 21 which was proximately caused by any false representation you answered "Yes" to in Question No. 19?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER BY STATING THE PERCENTAGE ATTRIBUTED TO EACH CORPORATION OR INDIVIDUAL THAT YOU ANSWERED "YES" TO IN QUESTION 22.

Murray Investment Company/50%
Murray Advisory Corp./50%
Gar-Dal, Inc./_____
O. K. Jones/_____
Ted Hunt, Jr./_____
Charles Shaver/_____
R. L. McSpedden/_____
Paul Hamby/_____

DO NOT ANSWER ANY OF THE FOLLOWING QUESTIONS AND PROCEED TO THE FINAL INSTRUCTIONS OF THE CHARGE, *UNLESS* YOU ANSWERED "YES" TO ANY PART OF EITHER QUESTION 1, OR QUESTION 4, OR QUESTION 19, *AND* YOU ALSO ANSWERED BY FINDING AN AMOUNT OF DAMAGES IN EITHER QUESTION 9, 10, OR QUESTION 21.

FOR THE FOLLOWING QUESTIONS YOU ARE INSTRUCTED THAT A "GOOD AND WORKMANLIKE MANNER" IS THE MANNER IN WHICH THE ORDINARILY PRUDENT PERSON ENGAGED IN SIMILAR WORK WOULD HAVE PERFORMED THE WORK UNDER THE SAME OR SIMILAR CIRCUMSTANCES.

24. Do you find from a preponderance of the evidence that Continental failed to fabricate or erect the steel for the building in a good and workmanlike manner and substantially in accordance with the plans and specifications furnished it by Gar-Dal, Inc.?

ANSWER "YES" OR "NO".

Answer/Yes

IF YOU ANSWERED QUESTION 24 "NO", DO NOT ANSWER ANY FURTHER QUESTIONS AND PROCEED TO THE FINAL INSTRUCTIONS OF THE CHARGE.

IF YOU ANSWERED QUESTION 24 "YES", PROCEED TO QUESTION 25.

25. Do you find from a preponderance of the evidence that Continental Steel knew or should have known that the building was collateral for a loan?

ANSWER "YES" OR "NO".

Answer/No.

26. Do you find from a preponderance of the evidence that any part of the difference, if any, on December 17, 1974 between: (1) the fair market value of the land and the building as represented to the Life Insurance Company of Virginia and, (2) the actual fair market value of both the land and the building on that date, as found by you in answer to Question 10, was proximately caused by Continental Steel Company's failure to fabricate or erect the steel in a good and workmanlike manner?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER "YES" OR "NO".

Answer/Yes

27. If you have answered Question 26 "Yes", then answer the following question. Otherwise, do not answer the following question but proceed to answer Question 28.

Do you find from a preponderance of the evidence that Continental Steel knew or should have known that its failure to fabricate or erect the steel in a good and workmanlike manner would cause the actual fair market value of the land and building on December 17, 1974 to be less than the fair market value of the land and building

as represented on that date?

ANSWER "YES" OR "NO".

Answer/Yes

28. Do you find from a preponderance of the evidence that any part of the difference, if any, on December 17, 1974 between: (1) the amount of the Note ($1,050,000), and (2) the actual fair market value of both the land and the building which secured the Note, as found by you in Question 9, was proximately caused by Continental Steel Company's failure to fabricate or erect the steel in a good and workmanlike manner?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which caus such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER "YES" OR "NO".

Answer/_____

29. If you have answered Question No. 28 "Yes", then answer the following question; otherwise, do not answer the following question, but proceed to answer Question No. 30.

Do you find from a preponderance of the evidence that Continental Steel knew or should have known that its failure to fabricate or erect the steel in a good and workmanlike manner would cause the actual fair market

value of both the land and the building which secured the Note to be less than the amount of the Note ($1,050,000) on December 17, 1974?

ANSWER "YES" OR "NO".

Answer/_____

30. Do you find from a preponderance of the evidence that any part of the difference, if any, between the amount of the Note ($1,050,000) and the actual fair market value of the Note on December 17, 1974, as found by you in answer to Question 21, was proximately caused by Continental Steel Company's failure to fabricate or erect the steel in a good and workmanlike manner?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER "YES" OR "NO".

Answer/Yes

31. If you have answered Question No. 30 "Yes", then answer the following question. Otherwise, do not answer the following question and proceed to Question 32.

Do you find from a preponderance of the evidence that Continental Steel knew or should have known that its failure to fabricate or erect the steel in a good and workmanlike manner would cause the actual fair market

value of the Note on December 17, 1974 to be less than the amount of the Note ($1,050,000)?

ANSWER "YES" OR "NO".

Answer/Yes

32. Do you find from a preponderance of the evidence that Murray Investment Company or Murray Advisory Corporation ratified Continental's failure, if you have so found, to fabricate and erect the steel in a good and workmanlike manner?

You are instructed that a party ratifies an act when, with knowledge of all the material facts, it accepts, adopts, confirms or approves, by words or conduct, an act previously done on its behalf and for its benefit by another who acts without authority. In this regard, you are further instructed that facts are "material" if a reasonable man would attach importance to them in determining his course of action.

ANSWER "YES" OR "NO".

Murray Investment ratified/Yes
Murray Advisory ratified/Yes

33. Do you find from a preponderance of the evidence that Murray Investment or Murray Advisory waived any complaints they had with respect to Continental's failure, if you have so found, to fabricate and erect the steel in a good and workmanlike manner?

You are instructed that a party waives a right when it intentionally relinquishes a known right or knowingly engages in intentional conduct inconsistent with claiming such right.

ANSWER "YES" OR "NO".

Murray Investment waived/Yes
Murray Advisory waived/Yes

34. If you have answered Question 26 "Yes", then answer the following question. Otherwise, do not answer the following question, but proceed to Question No. 35.

What amount of the difference, if any, on December 17, 1974 between the fair market value of the land and the building as represented and the actual fair market value of both the land and the building on that date, as found by you in answer to Question 10, do you find from a preponderance of the evidence to have been proximately caused by Continental Steel's failure to fabricate or erect the steel in a good and workmanlike manner?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER BY STATING THE AMOUNT.

Answer/$45,000

35. If you have answered Question 28 "Yes" then answer the following question, but proceed to question No. 36.

What amount of the difference, if any, on December 17, 1974 between the amount of the Note ($1,050,000) and the actual fair market value of both the land and the building

which secured the Note, as found by you in answer to Question 9, do you find from a preponderance of the evidence to have been proximately caused by Continental Steel's failure to fabricate or erect the steel in a good and workmanlike manner?

You are instructed that "proximate cause" is the cause which in a natural and continuous sequence, produces an event, and without cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER BY STATING THE AMOUNT.

Answer/_____

36. If you have answered Question 30 "Yes" then answer the following question; otherwise, do not answer the following question, and proceed to read the rest of the charge.

What amount of the difference, if any, between the amount of the Note ($1,050,000) and the actual fair market value of the Note on December 17, 1974, as found by you in answer to Question 21, do you find from a preponderance of the evidence to have been proximately caused by Continental Steel's failure to fabricate or erect the steel in a good and workmanlike manner?

You are instructed that "proximate cause" is the cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the

act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

ANSWER BY STATING THE AMOUNT.

Answer/$30,000

Do not decide who you think should win and then try to answer the questions. You will not decide any issue by lot, by drawing straws, or by the use of any other method of chance. Do not reach your result by adding together each juror's figures and dividing by the number of jurors to get an average. Further, do not do any trading on your answers as your answers and verdict must be unanimous; that is, all of the jurors must agree to each of your answers.

If during the course of your deliberations, you wish to communicate with the Court, you should do so only in writing by a written note handed to the Marshal and signed by the Foreman.

You should now retire to the jury room to deliberate upon your verdict. You may take this Charge with you as well as the exhibits which the Court has admitted into evidence. You will select your foreman, and after you have reached your verdict, you will return this Charge together with your written answers to the foregoing interrogatories.

Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Your foreman will sign in the space provided after you have reached your verdict.

/s/ Robert W. Porter
United States District Judge

DATE April 11, 1979

VERDICT OF THE JURY

We, the Jury, have answered the above and foregoing questions as herein indicated, and herewith return the same into Court as our verdict.

/s/ J. B. Burgess
FOREMAN

DATE 4/12/79

Petitioner's Reply Brief

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No. 81-798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE MURRAY INVESTMENT COMPANY and
MURRAY ADVISORY CORPORATION,
Petitioners,

v.

THE LIFE INSURANCE COMPANY OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

REPLY OF PETITIONERS

I. The Existence Of A Conflict Between The Sixth And Fifth Circuits Warrants Issuance Of The Writ

To the extent Petitioners can demonstrate the Fifth and Sixth Circuits have reached conflicting resolutions of the question presented to this Court, Petitioners have shown a special and important reason as required by Sup. Ct. R. 17.1 for the Court to issue a writ of certiorari. The conflict need not be an "embarrassing" one, as Respondent implies (Res. Br. 5),[1] because the intermediate

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[1] Throughout this Reply Brief, "Res. Br." and "Res. Br. App." shall mean, respectively, Respondent's Brief in Opposition and the appendix thereto. "Pet." and "Pet. App." shall mean, respectively, the Petition for a Writ of Certiorari and the appendix thereto filed by Petitioners.

appellate courts are generally courts of last resort for most federal litigators; thus, consistency in their rulings and judgments is vital. Indeed, Sup. Ct. R. 17 recognizes that a large part of this Court's role as the paramount decision maker is to resolve conflicts that arise within the federal judicial system. The existence of a circuit conflict is, accordingly, a most persuasive reason for granting a writ. 13 J. MOORE FEDERAL PRACTICE ¶ 817.05 (2d ed. 1981).

Where a case truly contains a conflict, some distinguished commentators have contended that the conflict need not be one of *national* importance; the case is said to derive its significance from the mere existence of the conflict and the need for uniform application of the law. 13 J. MOORE FEDERAL PRACTICE ¶ 817.21 (2d ed. 1981).[2]

Respondent's contention (Res. Br. 6) that the question presented is not special or important because it has yet to be presented to this Court is unpersuasive. Literally, under subparagraph (c) of Sup. Ct. R. 17, a federal question of first impression *is* special and important. 13 J. MOORE FEDERAL PRACTICE ¶ 817.41 (2d ed. 1981). Moreover, it is notable that the issue has also arisen in *Union Planters National Bank v. Commercial Credit Business Loans*, 651 F.2d 1174 (6th Cir. 1981), *cert. pending* (No. 81-735), which was decided almost simultaneously with the instant case.

There are persuasive empirical grounds for rejecting Respondent's contention (Res. Br. 6) that federal trial courts could not frequently encounter the same question that has arisen in both *Union Planters* and the instant case. For the 12-month period completed June 30, 1981,

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[2] The late Justice Harlan once noted that the most assured way of satisfying the requirement of a "special and important" reason is to show that the issue sought to be reviewed involves a conflict of decisions among the lower federal courts on a point of federal law. 13 J. MOORE FEDERAL PRACTICE ¶ 817.21 (2d ed. 1981).

there were 4,650 civil jury trials completed in all the United States District Courts.[3] Because each trial court, in its discretion, could have chosen in each of these 4,650 jury trials to submit a Fed. R. Civ. P. 49(a) special charge to the jury, *Miskell v. Southern Food Co.*, 439 F.2d 790, 792 (5th Cir. 1971), the question could arise on manifold occasions and is undisputably a special and important one that requires the attention of this Court.

Respondent apparently contends that this Court should consider a rule of civil procedure to be an inferior creature to be reviewed sparingly because it is not a matter of "public importance." (Res. Br. 6-7).[4] This contention can be flatly rejected, however, by examining the reason Congress empowered this Court to promulgate uniform rules of procedure. 28 U.S.C. § 2072 (Supp. 1981). The broad aim of the Rules Enabling Act, especially in fields of practice, was to reverse the philosophy of conformity to local state procedure and to institute uniformity within the whole federal judicial trial system. *Monarch Insurance Co. of Ohio v. Spach*, 281 F.2d 401, 408 (5th Cir. 1960). Rather than being *less* important because it pertains to a procedural rule, the circuit conflict presented for review is of *greater* significance because it involves a rule that was promulgated to achieve uniformity and eliminate conflict.[5]

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[3] ADMINISTRATIVE OFFICE OF THE UNITED STATES, 1981 ANNUAL REPORT OF THE DIRECTOR A38-A39 (prelim. ed. 1981). "Civil jury days rose to nearly 20,000 or 19 percent above the 1980 level." *Id.* at 5.

[4] Respondent's argument falls victim to this Court's recent decision to review a lower court decision regarding application of a rule of civil procedure (Fed. R. Civ. P. 37(b)(2)(A)). *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, cert. granted* (No. 81-440), 50 U.S.L.W. 3333 (November 3, 1981).

[5] Respondent also appears to argue that a conflict among scholars is purely "academic" and as such is not special or important. Petitioners rely upon a conflict between two circuits to warrant review, not upon divisive opinions of commentators. Nevertheless, it is evi-

II. The Sixth And Fifth Circuit Decisions Conflict

The holdings at issue here are irreconcilable. The Sixth Circuit has held that it is proper to tie[6] a jury's answer to a special verdict issue to a particular cause of action and thus circumscribe the legal effect of the fact determination. 651 F.2d at 1187. (Pet. App. 53a.) The court below has effectively held that a jury's answer cannot be so tied; it has ruled that a special verdict issue *conditionally* submitted to a jury (exemplary damages for committing § 27.01 fraud) can be a predicate for recovery on a theory *not* submitted to the jury (exemplary damages for committing tortious breach of contract). 646 F.2d at 229. (Pet. App. 9a.)[7] The court below has erroneously held that "the inapplicability of Section 27.01 as a legal remedy in no way negates the fact issues submitted to the jury regarding fraud," 646 F.2d at 229 (Pet. App. 9a), while the Sixth Circuit has held that a trial court's "ruling that the loan participation was not a security thereby eclipsed the jury's answer to Special Verdict No. 1, requiring a judgment for the defendant." 651 F.2d at 1187. (Pet. App. 53a.) In other words, the Fifth Circuit holds that the unavailability of a particular remedy does not nullify the legal effect of a special verdict answer, while the Sixth Circuit holds that the unavailability of the remedy for which an issue is submitted to

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dent that this Court does not steadfastly ignore the opinions of commentators. *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.*, —— U.S. —— (1981), 49 U.S.L.W. 4537, 4539 n. 6 (May 26, 1981).

[6] Respondent concedes the special verdict issue in *Union Planters* was "expressly tied to a specific cause of action." Res. Br. 4.

[7] It is undisputed that the trial court below submitted Issue No. 15 only to determine whether exemplary damages should be awarded in connection with Respondent's § 27.01 claim. (Pet. App. 20a.) The Fifth Circuit acknowledged that Issue No. 15 was submitted "to the jury in conjunction with the Section 27.01 questions." 646 F.2d at 227 (Pet. App. 5a).

the jury circumscribes the legal effect of the jury's factual determination.

Respondent surely recognizes this conflict between the circuits, for it devotes two pages of its brief (Res. Br. 8-9) in support of the Fifth Circuit position. The reasoning and case authorities on which Respondent relies in attempting to bolster the decision below, however, are inapposite because they involve jury fact findings that are distinct from the jury finding involved here. Respondent contends that a fact determination once made by a jury may not be ignored merely because the trial court submitted the issue with a different ground of recovery in mind (Res. Br. 8). This position would be well taken if the special verdict question involved were, for example, merely one factual element of a particular cause of action (*i.e.*, reliance as an element of the tort of fraud) which could apply equally to another cause of action that requires the same fact finding.

Issue No. 15, however, did not ask the jury to find one rudimentary element that could apply to more than one cause of action; it followed 14 questions that related solely to § 27.01 fraud and conspiracy to commit § 27.01 fraud and was conditionally submitted in a manner that permitted the jury to discern that they could not award exemplary damages without first finding § 27.01 fraud or conspiracy to defraud.[8] The issue asked the jury, in its discretion, to award such damages as would serve as an example to others and would penalize Petitioners[9] in connection with one particular claim of Respondent:

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[8] To answer Issue No. 15, the jury had to have answered Issue No. 14 which, in turn, would not have been answered absent affirmative findings either with respect to Issues No. 1 (conspiracy) or 4 (§ 27.01 fraud). *See* Res. Br. App. A-55.

[9] The jury charge defined "exemplary damages" as "an amount which you may in your discretion award as an example to others and as a penalty by way of punishment for a wrongful act done willfully if the facts warrant the same." Res. Br. App. A-56.

§ 27.01 fraud. To ignore the reason the trial court submitted the issue to the jury, which reason the court below acknowledged ("in conjunction with the Section 27.01 questions, the jury found that exemplary damages should be awarded in the amount of $500,000," 646 F.2d at 227 [Pet. App. 5a]), is to disregard completely the fact that the jury was *not* making a fact finding that could be utilized for multiple purposes but rather one expressly tied to a particular cause of action. Respondent's attempt to justify the Fifth Circuit's holding ignores the distinctive nature of the jury issue.

Respondent also contends that the two circuit decisions are reconcilable because the ground on which the *Union Planters* plaintiff sought to recover was not raised until the case reached the Sixth Circuit [10] whereas Respondent raised its claim for exemplary damages in its complaint. (Res. Br. 4-5). Respondent errs in its analysis by failing to compare the procedural stage of the two cases that is actually at issue here. Respondent contends the holdings can be reconciled by comparing the *pleadings* of the *Union Planters* plaintiff with Respondent's pleadings. The proper comparison, however, is of the two *jury charges*. The *Union Planters* plaintiff failed to request a jury issue on Tennessee common law intentional fraud. Post-verdict, it sought to utilize the jury's answer to an answer expressly tied to another ground of recovery as a surrogate

[10] There is authority, however, that the issue *was* presented to the *Union Planters* trial court. The Sixth Circuit noted that plaintiff moved in the trial court to alter or amend the judgment on the Tennessee common law count," 651 F.2d at 1177 (Pet. App. 30a) and further noted that "[i]n a post-trial motion to alter or amend the judgment on Tennessee common law fraud, the Bank argued that because a finding of intentional fraud was inherent in the jury's answer to Special Verdict No. 1, the contributory fault verdict was precluded. . . ." 651 F.2d at 1186 (Pet. App. 50a). Petitioner in *Union Planters* contended this motion "squarely raised the precise issue." Petition for Certiorari at 12 n. 9, *Union Planters National Bank v. Commercial Credit Business Loans* (No. 81-735).

for the missing issue. Likewise, Respondent did not object to the trial court's failure to submit a tortious breach of contract exemplary damage issue and did not object to the conditional nature of the § 27.01 exemplary damage question as submitted. Post-verdict, it seeks to use as a substitute a jury answer that undoubtedly concerned the awarding of such damages for § 27.01 fraud alone.

This Court should grant the petition for a writ of certiorari and apply the postulate of fundamental fairness and due process that the Sixth Circuit adopted and the Fifth Circuit essentially rejected. Just as the Sixth Circuit noted that the defendant in *Union Planters* had "no meaningful opportunity to argue the issue in the district court [that plaintiff sought to utilize as a surrogate] . . .", 651 F.2d at 1188 (Pet. App. 54a.), in the instant case Petitioners were afforded no opportunity to argue to the jury whether exemplary damages should be awarded for tortious breach of contract because that recovery was first realized by Respondent in the court of appeals.

CONCLUSION

The question presented is important and involves a conflict between two circuits that should be resolved by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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